Consumer Track

"Unbundling" in the Representation of Consumer Debtors: What Are the Differences Between You and a Petition Preparer?

Hon. Thomas T. Tucker, Moderator
U.S. Bankruptcy Court (E.D. Mich.); Detroit

Deborah K. Ebner
The Law Office of Deborah Kanner Ebner; Chicago

Caralyce M. Lassner
Caralyce M. Lassner, JD, PC; Utica, Mich.

Mark S. Zuckerberg
Law Office of Mark S. Zuckerberg; Indianapolis

"UNBUNDLING" IN THE REPRESENTATION OF CONSUMER DEBTORS:

What are the Differences Between You and a Petition Preparer?

- Today's Presenter's are:
  - Hon. Thomas J. Tucker
    U.S. Bankruptcy Court (E.D. Mich); Detroit
  - Deborah K. Ebner
    Law office of Deborah K. Ebner; Chicago
  - Caralyce M. Lassner
    Caralyce M. Lassner, JD, PC; Utica, Mich.
  - Mark S. Zuckerberg
    Law Office of Mark S. Zuckerberg; Indianapolis

contact

x prohibited Posted: 3 days ago

CHEAP/QAULITY LEGAL SERVICES ( )

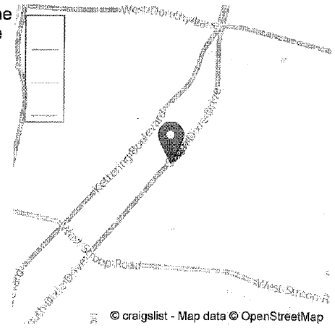
My name is and I recently relocated to the area! I am a very good lawyer, capable of handling any type of case local, state or federal.

As we all know, times are tough! Most people can't afford lawyers prices! I know I can't!

Please text me at show contact info for a free consultation to see if I can help you!

Ghost writing services, appearance in federal court, cheap legal research and advice... especially if you are representing yourself!

Thank you for your interest! I am building a growing practice here and would love to help even more people.



(google map) (yahoo map)

Trust me, I am one of the few ethical and honest attorneys! I come with excellent recommendations.

- do NOT contact me with unsolicited services or offers

post id: posted: 3 days ago updated: 2 hours ago email to friend best of

BRIEF OVERVIEW OF UNBUNDLING

a. What is it

b. What purpose does it serve?

ABI ETHICS TASK FORCE RECOMMENDATIONS

HYPOTHETICAL #1 FACTUAL SCENARIO:

Debtor meets with counsel regarding a Chapter 7 bankruptcy filing. Due to the debtor's household size and income, there is no question that he qualifies as a candidate for Chapter 7. However, one of the debtor's creditors has obtained a state court judgment. He wants to file bankruptcy as soon as possible out of fear of a wage garnishment and a levy on his bank account. The debtor earns the minimum wage at his job and cannot afford the upfront $1,500 flat fee quoted for representation in his Chapter 7 case. The debtor says he can pay $500 immediately and offers to pay the remainder after the bankruptcy filing. How should you proceed?

HYPOTHETICAL #1 ANSWER:

Debtor and counsel should enter into separate fee agreements for pre- and post-petition services. The pre-petition agreement should provide for payment of the $500 in legal fees for specifically outlined pre-petition services. The pre-petition agreement should contain a clause expressly providing that counsel will not represent the debtor after filing the bankruptcy petition unless a separate post-petition fee agreement is signed. The legal fees for post-petition services should also be disclosed in the pre-petition agreement, and there should be no language obliging the debtor to hire counsel for post-petition services.

After filing the debtor's Chapter 7 case, counsel and debtor should enter into a post-petition fee agreement for the remaining $1,000. Counsel should take great care in drafting these separate fee agreements so not to raise dischargeability issues regarding the post-petition legal fees. Boilerplate language should not be used, as courts construe these agreements in the light most favorable to the debtor. The keys to unbundling legal services are to provide competent representation, adequate consultation and informed consent in accordance with the applicable ethical rules. *See In re Slabbinck*, 482 B.R. 576, 597 (Bankr. E.D. Mich. 2012) (holding attorney's legal services for debtor may be unbundled between pre- and post-petition services where separate fee agreements were executed in strict conformance with the Modal Rules of Professional Conduct); *see also Walton v. Clark & Washington*, 469 B.R. 383, 385 (Bankr. M.D. Fla. 2012) (approving payment system in which "the client executes separate fee agreements for prepetition and postpetition services").

HYPOTHETICAL #2 FACTUAL SCENARIO:

Debtor meets with counsel regarding the filing of a Chapter 7 bankruptcy. Among other debts, the debtor is currently in the midst of the foreclosure of the primary lien against her residence. A judgment has been entered and the sheriff's sale date is next week. The debtor is elderly and needs additional time to move from her home. Her only income is Social Security and she has little savings. She would like to make a small down payment towards the legal fees pre-petition and offers several postdated checks to be deposited post-petition to pay the balance. How should you proceed?

HYPOTHETICAL #2 ANSWER:

As an example of what not to do, counsel should not enter into a fee agreement allowing the debtor to make a small pre-petition payment with the remainder to be paid post-petition. Courts have held all legal fees owed by Chapter 7 debtors at the time their bankruptcy petitions are filed are dischargeable under 11 U.S.C. § 727, including legal fees owed under a pre-petition agreement, whether or not the services were performed pre- or post-petition. *See Bethea v. Robert J. Adams & Assoc.*, 352 F.3d 1125 (7th Cir. 2003), *cert. denied*, 124 S.Ct. 2176 (2004). Postdated check fee agreements have also been invalidated as a violation of the automatic stay or discharge injunction. *See Walton*, 469 B.R. at 385.

HYPOTHETICAL #3 FACTUAL SCENARIO:

Debtor files for Chapter 7 bankruptcy. One of the debtor's assets is a vehicle with a secured loan held by Capital One Auto Finance. The debtor's monthly payments are reasonable and the loan is nearly paid off. The debtor receives a reaffirmation agreement and asks counsel for assistance in reaffirming the debt. Counsel explains to the debtor that negotiation of reaffirmation agreements and representation of debtor in any related proceedings are outside the scope of his representation in the bankruptcy case. Can legal services related to reaffirmation agreements be properly unbundled?

HYPOTHETICAL #3 ANSWER:

Probably not, several courts have held that excluding legal services related to reaffirmation agreements from the scope of representation is not a reasonable limitation. *See In re Collmar*, 417 B.R. 920, 923 (Bankr. N.D. Ind. 2009); *In re Minardi*, 399 B.R. 841, 852 (Bankr.N.D.Okla.2009); *In re Egwim*, 291 B.R. 559, 573 (Bankr. N.D.Ga. 2003). This is due to the integral role played by counsel in the reaffirmation process. The unbundling of legal services related to reaffirmation agreements is even less likely to garner court approval where debtors have not given their informed consent to such an exclusion. *Collmar*, 417 B.R. at 923.

HYPOTHETICAL #4 FACTUAL SCENARIO:

Counsel is a rural attorney who files a Chapter 7 bankruptcy for debtors, a husband and wife. The debtors' § 341 meeting of creditors is scheduled at a location that is over an hour drive, one way, from the attorney's law office. In an effort to save his time and his clients' money, the attorney has started unbundling his attendance at § 341 meetings from the legal services provided to debtors. Does this practice run afoul with any ethical rules or other obligations owed to his clients?

HYPOTHETICAL #4 ANSWER:

Although unbundling this service is common, most courts to address the issue have found attendance at the § 341 meeting to be a "fundamental and core" obligation imposed upon the attorney. *In re Johnson*, 291 B.R. 462, 470 (Bankr. Minn. 2003) (citing *In re Castorena*, 270 B.R. 504, 530 (Bankr. D. Idaho 2001)); *see also In re Bancroft*, 204 B.R. 548 (Bankr. C.D. Ill. 1997). As such, it is likely to be "exceedingly difficult" to show the obligation to attend the § 341 meeting was properly contracted away. *Id.*

HYPOTHETICAL #5 FACTUAL SCENARIO:

Debtor files a Chapter 7 bankruptcy and is awaiting her discharge. A creditor timely files an adversary complaint asserting the nondischargeability of a certain debt under 11 U.S.C. § 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity. Can the debtor's attorney successfully unbundle representation of the debtor in the adversary proceeding from the other legal services provided in her Chapter 7 case?

HYPOTHETICAL #5 ANSWER:

Yes, several courts have held that adversary proceedings can be unbundled from a consumer's main bankruptcy case and attorneys may charge additional fees for representation of a debtor in an adversary proceeding. As stated by one bankruptcy court, this practice is not necessarily evil, but "must be done intelligently and in accordance with the applicable rules of professional responsibility" and other relevant laws. *In re Seare*, 493 B.R. 158, 227 (Bankr. D. Nev. 2013). The *Seare* case demonstrates how to avoid running afoul with ethical rules when unbundling these types of legal services.

Prior to filing bankruptcy, the debtor in *Seare* had a judgment entered against him based in part on fraud. A wage garnishment was initiated and the debtor and his wife sought advice from bankruptcy counsel. After the initial consultation, the debtors signed a retainer agreement which was evidently the same for all clients. The retainer agreement provided that representation of the debtors in an adversary proceeding was not included in the firm's basic bankruptcy services, and that additional fees may be charged. The garnishment and underlying lawsuit were listed throughout the debtors' bankruptcy schedules and statement of financial affairs. The creditor subsequently filed an adversary proceeding seeking the nondischargeability of the debt pursuant to 11 U.S.C. §§ 523(a)(4) and (6).

The attorney who filed the debtors' bankruptcy case refused to defend the adversary proceeding, claiming the retainer agreement unbundled those legal services from the scope of his representation. The bankruptcy court entered an order to show cause as to why sanctions should not be entered against the attorney for his failure to represent the debtors in the adversary proceeding. The court ultimately found the bankruptcy attorney breached his duty of competence by failing to ascertain the debtors' objective to eliminate the wage garnishment related to a fraud judgment. Basically, the court found the attorney failed to properly inform himself as to the situation surrounding the fraud judgment, since the attorney's practice was to treat all clients the same with little or no differentiation between cases. The court found the attorney violated numerous state ethical rules and Bankruptcy Code sections in the matter, and entered sanctions in an effort to incentivize the attorney from operating his bankruptcy "mill" system of processing cases.

HYPOTHETICAL #6 FACTUAL SCENARIO:

After meeting with a potential client, counsel determines that the debtor is a good candidate for Chapter 7 bankruptcy. Counsel quotes the client a flat legal fee of $1,500 for standard representation in her bankruptcy case. The debtor then informs counsel that she cannot afford the legal fee. She is a single mother with several dependents and earns minimum wage at her job. She does not expect her financial situation to change in the future, thus allowing her to pay the legal fees at some later date. The debtor asks you if there is any way you can still assist her (at a much lower fee) without officially representing her in the bankruptcy case. She says she heard from a friend that attorneys sometime assist in the preparation of bankruptcy petitions and related documents, but the debtors represent themselves in the actual bankruptcy case. What issues does counsel face in this scenario?

HYPOTHETICAL #6 ANSWER:

The term "ghostwriting" has been coined to describe the behind the scenes preparation of legal documents by attorneys for clients who represent themselves in court. The attorney prepares the legal documents, but does not sign them.

Proponents of ghostwriting assert that this gives lower and middle class debtors access to the legal system at an affordable cost. Opponents point to the numerous ethical issues that can arise. For example, *pro se* bankruptcy filers are generally held to a less stringent standard and are granted special leniency by trustees and courts. Opponents also argue unbundled ghostwriting violates several rules of professional conduct including the duty of candor to the court and the duty of fairness to opposing parties. *See, e.g.,* ABA Model Rule of Professional Conduct 3.3 Candor Toward the Tribunal, Rule 3.4 Fairness to Opposing Party & Counsel.

The American Bar Association Standing Committee on Ethics and Professional Responsibility has opined that whether ethical violations occur depend on the extent of a ghostwriter's participation. The more extensive the assistance to the *pro se* litigant, the more likely an attorney is to run afoul with the rules of professional conduct. An undisclosed attorney who renders extensive assistance to a *pro se* litigant is involved in the litigant's misrepresentation contrary to the ABA Model Code of Professional Responsibility DR 1-102(A)(4). This Rule provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

However, it may still be possible to unbundle ghostwriting services without violating the rules of ethics. Ghostwriting creates an attorney-client relationship, so an attorney must be in full compliance with the rules of professional conduct. It is advisable for attorneys to sign pleadings they have substantially prepared. Several courts have found failure to do so to be unlawful. Attorneys should also prepare engagement agreements that carefully outline the ghostwriting services to be unbundled. It should be clear to all parties involved the limited extent of the attorney's legal services in the matter.

HYPOTHETICAL #7 FACTUAL SCENARIO:

Debtor comes to your office with a complicated factual scenario. He has over $185,000 in unsecured debt, and several of his creditors have filed suit. The first creditor to obtain a judgment against the debtor has started a wage garnishment. The debtor makes good money at his job as an engineer, but the wage garnishment has left him unable to pay his necessary monthly expenses. The debtor was also a beneficiary under his father's will. His father passed away last year, and left all his property – including his unencumbered residence – to the debtor and his sister. Due to the debtor's financial problems, he quitclaimed his interest in the residence to his sister without any consideration. The last property tax assessment assessed the residence's value at $165,000. This raises fraudulent transfer concerns and will likely raise the amount the debtor must pay into his Chapter 13 plan under the liquidation analysis pursuant to 11 U.S.C. § 1325(a)(4).

The debtor was also divorced three years ago. Pursuant to the terms of the divorce decree and property settlement agreement, he is to pay $525 per week in child support. The debtor is current on his child support obligations, but will not be able to maintain payments due to the wage garnishment. In addition to smaller obligations, he was ordered to pay his ex-wife $79,500 in equity in their former marital residence. Debtor is still living in the residence, but it is in foreclosure. His ex-wife is aware of the debtor's financial troubles, and has hired an attorney to represent her in his future bankruptcy case. It has been communicated to the debtor that she intends to fight the discharge of this obligation by arguing it falls within the parameters of a "domestic support obligation" pursuant to 11 U.S.C. § 523(a)(5).

It is your practice not to represent debtors involved in such complicated matters and refer such cases to other attorneys. However, the debtor is desperate and asks for your help. Since the wage garnishment is in place, he does not have enough money to pay his next car payment or cell phone bill. He will also soon fall behind on child support. He asks if you can file the barebones paperwork with the bankruptcy court to start his Chapter 13 case. This will stop the wage garnishment and give him additional time to hire a new attorney. What ethical and legal issues arise in this scenario?

HYPOTHETICAL #7 ANSWER:

This scenario is rife with potential ethical and legal issues, so one must tread carefully. Unbundling legal services in a Chapter 13 bankruptcy raises many of the same issues as in Chapter 7. The debtor's attorney should be aware of his or her state's rules of professional conduct to ensure the debtor provides informed consent to the unbundling of legal services. For example, Model Rule of Professional Conduct 1.2(c) provides "[a] lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."

Attorneys also have a duty under Model Rule of Professional Conduct 1.1 to provide competent representation to a client. This requires the legal knowledge, skill and preparation reasonably necessary for competent representation.

The fee agreement for pre-petition work should outline the pre-petition services in detail as well as the post-petition services that will not be performed by the attorney. The fee agreement should also list the ramifications and risks of proceeding without an attorney after the case is filed, and clearly provide that it is the debtor's intention to hire a new attorney to represent him after the initial filing of his bankruptcy case within a certain time period. Despite informed consent and a carefully worded fee agreement, this arrangement is likely to draw scrutiny from the Chapter 13 trustee and/or the court.

Subsequent to filing the case, the attorney could file a motion to withdraw from the case. *See In re Egwim*, 291 B.R. 559, 579 (Bankr. N.D. Ga. 2003) (citing *In re Pair*, 77 B.R. 976, 979 (Bankr. N.D.Ga. 1987)). A number of factors determine whether a court will permit an attorney to withdraw representation in this scenario. Exigent circumstances aside, it seems unlikely withdrawal would be permitted where the debtor delays or fails to hire new counsel. The attorney may unwittingly find him- or herself bound to represent the debtor by the court and rules of ethics.

HYPOTHETICAL #8 FACTUAL SCENARIO:

A potential client comes to your office and wants to immediately file bankruptcy. She is elderly and her only income is Social Security and wages from a part-time job. Her bank account was recently frozen by a judgment creditor and her rent is due at the end of the week. The client does not have funds to pay your legal fees and is very distraught by the entire situation. She is a below median consumer debtor and otherwise qualifies for a Chapter 7 bankruptcy. Schedules I and J show the debtor has no disposable income to fund a Chapter 13 plan. Is it a viable option to place the client in a "fee-only" Chapter 13 plan?

HYPOTHETICAL #8 ANSWER:

It depends – the propriety of fee-only Chapter 13 plans is an issue that has divided bankruptcy courts. Several courts have rejected fee-only plans. *See*, *e.g.*, *In re Paley*, 390 B.R. 53, 59 (Bankr.N.D.N.Y. 2008) (rejecting fee-only plan as contrary to spirit and purpose of Bankruptcy Code); *In re Platt*, Case No. 12-6170-RLM-13 (Bankr. S.D. Ind. Nov. 19, 2012) (holding that although not all fee-only Chapter 13 plans are *per se* filed in bad faith, debtor failed to demonstrate "special circumstances" to warrant confirmation).

Numerous other courts have upheld fee-only plans, including the Fifth Circuit Court of Appeals. In *In re Crager*, 691 F.3d 671 (5th Cir. 2012), the Fifth Circuit reversed the ruling of the district court and affirmed the bankruptcy court's confirmation of the debtor's fee-only Chapter 13 plan. *Crager* involved a debtor who was unemployed and whose main source of income was Social Security and food stamps. Her main asset was her primary residence, which was encumbered by a mortgage. She had nearly $8,000 in credit card bills and anticipated incurring future medical bills due to health issues. The debtor decided to file Chapter 13 bankruptcy for several reasons. It would have taken her over a year to save the money to file Chapter 7 bankruptcy, and she would have had to stop making the minimum payments on her credit cards. She was also concerned that filing Chapter 7 would prevent her from declaring bankruptcy again for a longer period, as she anticipated incurring future medical bills. Thus, her attorney filed the fee-only Chapter 13 case.

The Chapter 13 trustee subsequently objected to confirmation of her plan. The objection asserted the debtor's petition and plan were not filed in good faith pursuant to 11 U.S.C. §§ 1325(a)(3) and (7). Courts in the Fifth Circuit apply a "totality of the circumstances" test to determine whether a Chapter 13 petition and plan are filed in good faith. The bankruptcy court applied this test and approved the debtor's plan. The district court reversed and the Circuit Court later affirmed the bankruptcy court's confirmation of the plan. *See also*, *In re Puffer*, 674 F.3d 78, 80 (1st Cir. 2012) (holding fee-only plans are not *per se* filed in bad faith and remanding to district court for further proceedings).

HYPOTHETICAL #9 FACTUAL SCENARIO:

A potential client meets with counsel regarding the filing of a bankruptcy case. The client seems like a candidate for Chapter 7 bankruptcy, but his case presents several complex issues. First, the client has several years of late and unfiled income tax returns with both the federal and state taxing authorities. In order to determine the priority and dischargeability status of the income taxes, counsel will need to order tax transcripts and complete a tax analysis. One of the debtor's creditors also obtained a default judgment against him in state court on the basis of fraud. It appears likely the creditor will file an adversary proceeding seeking nondischargeability of the debt under 11 U.S.C. § 523.

You quote the client a flat fee of $2,500 to complete a pre-petition tax analysis and to file a barebones Chapter 7 petition. Client promptly pays the retainer and asks you to begin work on the case. Several weeks later, the client calls you and says he does not want to file bankruptcy. He intends to make payment arrangements with his creditors. As such, he asks for a refund of the $2,500 retainer. You have already spent several hours working on the case and meeting with the client. The fee agreement signed with the client contains a non-refundability clause. How much – if any – of the $2,500 retainer are you obligated to return to the client?

HYPOTHETICAL #9 ANSWER:

As a general rule of thumb, attorneys are obligated to refund clients any unearned fees. Fee advances paid by clients to be earned on an hourly basis must be held in trust. If representation ends prior to earning the fee advance, a disbursement from the trust account must be made to the client. *Estate of Forrester v. Dawalt*, 562 N.E. 2d 1315, 1317-18 (Ind. Ct. App. 1990); *see also Matter of Kendall*, 804 N.E.2d 1152, 1160 (Ind. 2004).

A refund of fixed fees presents a slightly more complicated scenario. It has been held that fixed fees may be deemed earned when paid, therefore these fees do not have to be deposited into trust. Fixed fees immediately become the attorney's property. However, fixed fees are not immune to refundability. In certain situations, an attorney may be required to make a prompt refund from the attorney's own funds when the attorney's services end prematurely.

In Indiana, the law has clearly established that attorney's fees cannot be non-refundable. Indiana Rule of Professional Conduct 1.16(d) and *Matter of Thonert*, 682 N.E.2d 522, 524-25 (Ind. 1997) clearly establish non-refundability provisions in fee agreements are unreasonable and unethical.

Unbundling Bankruptcy Representation: The Rules

Caralyce M. Lassner
Caralyce M. Lassner, JD, PC, Utica, MI

"Unbundling is a method of legal service delivery in which the lawyer breaks down the tasks associated with a client's legal matter and provides representation only pertaining to a clearly defined portion of the client's legal needs."[1] In recent years, unbundling of services has become more common as practitioners attempt to balance a client's needs with the economic realities of operating a law practice. As recently as February 2013, the American Bar Association's House of Delegates "adopted a resolution encouraging lawyers 'to consider limiting the scope of their representation, including the unbundling of legal services as a means of increasing access to legal services.' The resolution…also supports efforts 'to assure that practitioners who limit the scope of their representations do so with full understanding and recognition of their professional obligations.'"[2]

Notwithstanding this discussion being focused on the unbundling of legal services in the context of bankruptcy cases, it is impossible to discuss the topic without also discussing the rights or restrictions on compensation of attorneys in these cases as that aspect of this issue is most evident in the code, the rules, and the forms; the concept of "unbundling" being a relatively new one in the practice of bankruptcy law.

11 USC 329, FRBP 2016, and Form B203

11 USC 329(a) requires "[a]ny attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation."

The requirement of 11 USC 329(a) is reiterated by the requirements set forth in FRBP 2016(b), which states "[e]very attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by §329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed."

---

[1] *Law a la Carte: The Case for Unbundling Legal Services*, Stephanie L. Kimbro, ABA Solo, Small Firm, and General Practice Division, GP Solo Magazine, Volume 29 Number 5 (2012). Online access at: http://www.americanbar.org/publications/gp_solo/2012/september_october/law_a_la_carte_case_unbundling_legal_services.html

[2] *What Ethics Issues To Consider When Offering Unbundled Legal Services*, David L. Hudson Jr., ABA Journal, June 2013. Online access at: http://www.abajournal.com/magazine/article/lawyers_offering_unbundled_legal_services_must_consider_the_ethics_issues/

While both require counsel to disclose the amount of money agreed to and received, neither requires that counsel outline the services agreed to be rendered in connection with the fee. The only government-issued "guide" of services to be rendered in every bankruptcy case appears to be the official form, Form B203[3]. The official form states, in pertinent part:

> *5. In return for the above-disclosed fee, [Counsel has] agreed to render legal service for all aspects of the bankruptcy case, including:*
> *a. Analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether to file a petition in bankruptcy;*
> *b. Preparation and filing of any petition, schedules, statements of affairs and plan which may be required;*
> *c. Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof;*
> *d. Representation of the debtor in adversary proceedings and other contested bankruptcy matters;*
> *e. [Other provisions as needed]*
>
> *6. By agreement with the debtor(s), the above-disclosed fee does not include the following services:* _____.

To utilize the Official Form, without modification or further considerations, counsel should be prepared to represent the debtor in every phase and aspect of his or her bankruptcy case. Of additional note, Form B203 does not require the debtor's signature, only that of the attorney; and does not contemplate an hourly billing agreement.[4]

After becoming familiar with the federal requirements, one must look to the local rules, guidelines, standing or administrative orders, and other district-specific directives to determine what, if anything, may be unbundled in either a Chapter 7 or Chapter 13. We'll first take a look at some common denominators in Chapter 7 and Chapter 13 and wrap up with the applicable rules by District.

By the Chapter

It appears, by and large, that counsel is best equipped by understanding what is required in their representation of the client, and working backwards to determine what may be unbundled.

---

[3] The official form may be found at: http://www.uscourts.gov/uscourts/RulesAndPolicies/bkforms/official/b203.pdf

[4] Form B203, Paragraph 1:
Pursuant to 11 U .S.C. § 329(a) and Fed. Bankr. P. 2016(b), I certify that I am the attorney for the above named debtor(s) and that compensation paid to me within one year before the filing of the petition in bankruptcy, or agreed to be paid to me, for services rendered or to be rendered on behalf of the debtor(s) in contemplation of or in connection with the bankruptcy case is as follows:
For legal services, I have agreed to accept . . . . . $_____
Prior to the filing of this statement I have received . . . . . $_____
Balance Due . . . . . $_____

Chapter 7

Northern District of Illinois

The local rules, orders, and forms are silent as to specific services to be rendered by Debtor's counsel.

Central District of Illinois

Each division in the District has or had a standing order regarding "no look" fees. The standing order, dated 1/1/14, of the Springfield Division specifically states that there is no longer a "no look" fee in Chapter 7 cases and thus, this author is unable to determine if there is a standard list of expected services to be performed in a Chapter 7 case in this district. Counsel is advised to check the standing orders for each division in which they will have cases assigned.

Southern District of Illinois

ILSB LR 2092 states:

C. Obligations of Attorneys.

1. With respect to hearings, attorneys shall appear at all scheduled hearings, unless:

a. counsel advises the Court prior to the hearing that the matter has been resolved, and counsel has been excused;

b. at least one party appears and reports to the Court concerning resolution of the matter;

c. the Court has continued the matter; or

d. the Court has otherwise excused attendance.

2. Attorneys for debtors shall provide appropriate representation for the debtor at the 341 meeting. Failure of counsel to provide appropriate representation at any hearing or the 341 meeting is cause for the Court to reduce attorneys' fees or issue other sanctions. Counsel shall dress in courtroom attire when appearing at 341 meetings.

Northern District of Indiana

ND Ind LBR B-4008-1 requires counsel for the Debtor to appear at hearings on reaffirmation agreements.

Southern District of Indiana

SD Ind B-4008-1(c) requires that "[u]nless the attorney has withdrawn as attorney for the debtor pursuant to S.D.Ind. L..R. B-9010-1, an attorney who files a petition on behalf of a debtor (or an attorney in the same firm as the filing attorney) must represent the debtor during the negotiation and filing of any reaffirmation agreements, and appear at any hearings on reaffirmation agreements."

Northern District of Iowa

LR 4008-1(b)(5) of the Northern District of Iowa implies that counsel for the Debtor must participate, at least minimally, in negotiation of a reaffirmation agreement.

(b) Reaffirmation agreements containing the following deficiencies shall be deemed incomplete and a hearing notice shall issue, outlining the deficiencies and setting the matter for hearing at least 21 days after the date of the notice:

(1) Improper Form or Format (Use of a form/format other than Director's Form B-240);
(2) Lack of requisite signatures on form;
(3) Filed without Motion for Approval of Reaffirmation Agreement (Pro Se filers only);
(4) Existence of presumption of undue hardship (applies to all reaffirmation agreements with the exception of those filed by credit unions or reaffirmation agreements involving real property); or
(5) Incomplete Attorney Declaration.

Southern District of Iowa

The local rules, orders, and forms are silent as to specific services to be rendered by Debtor's counsel.

Eastern District of Michigan

Guideline 13 requires counsel to represent clients in the negotiation of reaffirmation agreements. Specifically, "As a matter of fulfilling the obligations of counsel for a debtor in a Chapter 7 case: • Counsel may not exclude from representation services relating to a reaffirmation agreement; and • Counsel shall appear and represent the debtor at any hearing on any reaffirmation agreement."[5]

Western District of Michigan

The local rules, orders, and forms are silent as to specific services to be rendered by Debtor's counsel.

District of Minnesota

Local Rule 1007-3-1 requires that "[i]n any chapter 7 or chapter 13 case in which the debtor is represented by an attorney, the debtor shall file with the petition a Notice of Responsibilities, including a scanned image of the signature page signed by the attorney and the debtor(s). The Notice of Responsibilities shall conform to Local Form 1007-3-1(7) in chapter 7 cases and Local Form 1007-3-1(13) in chapter 13 cases."

The Notice of Responsibilities form for Chapter 7 matters is substantially similar to the forms used in other Districts identified elsewhere in these materials. The form is located on the Court's website under their local forms link.[6]

Of additional note is Local Rule 4008-1, which appears to imply that a reaffirmation agreement may be entered into between Debtors and their counsel. Rule 4008-1 states, in pertinent part: "If a reaffirmation agreement that was made after the filing of the petition but before entry of the discharge is filed with the clerk…, and if…the non-debtor party to the

[5] Effective December 16, 2009; found at http://www.mieb.uscourts.gov/guidelines-local-rules.
[6] http://www.mnb.uscourts.gov/Newsite/Rules_Forms/forms/CH7NoticeofResponsibilites.pdf

agreement is the debtor's attorney, the clerk shall schedule a discharge hearing under §524(d) of the Code…."

Northern District of Ohio

The local rules, orders, and forms are silent as to specific services to be rendered by Debtor's counsel in a Chapter 7 consumer case.

Southern District of Ohio

The local rules and forms are silent as to specific services to be rendered by Debtor's counsel in a Chapter 7 consumer case. However, Judge Humphrey's policies and procedures advise that "[t]he debtor's counsel is responsible for ensuring that filed reaffirmation agreements are in compliance with the requirements of 11 U.S.C. § 524 and Bankruptcy Rule 4008,"[7] which may be read to imply that counsel must participate in negotiation of reaffirmation agreements. None of the other judges in the district have published similar policies.

Eastern District of Wisconsin

The local rules, orders, and forms are silent as to specific services to be rendered by Debtor's counsel.

Western District of Wisconsin

The local rules, orders, and forms are silent as to specific services to be rendered by Debtor's counsel.

Chapter 13

Northern District of Illinois

Review of the Court-Approved Retention Agreement[8] implies that the following services will be performed, personally, by counsel in all Chapter 13 cases:

- Counsel the debtor regarding the advisability of filing, the appropriate chapter, and whether non-bankruptcy options are available;
- explain to the debtor that hiring the attorney is for the entire case, including a discussion of how and when the attorney will be paid;
- attorney-client review of the pleadings when being signed;
- timely preparing and filing the pleadings;
- explaining the payment schedule and amounts;
- informing the client of his duty to maintain insurance;
- informing the client of court dates and attendance and necessity of both parties attending, if applicable;
- represent the client at the Meeting of Creditors;
- informing the client of any other attorney attending court hearings in attorney's place;
- timely provide documents required under 11 USC 521 or other applicable sections and/or rules;

[7] https://www.ohsb.uscourts.gov/OHSB/HearingSchedules/Dayton/Humphrey,GuyR/130229689394384032.PDF
[8] http://www.ilnb.uscourts.gov/sites/default/files/forms/Ch13_Model_Retention-Agreement2011.pdf

- timely prepare and file any amendments;
- read and review all ECF/filings;
- be available to the client throughout the plan;
- draft and file appropriate plan modifications;
- draft and file appropriate motions regarding disposition of property and incurring debt;
- objecting to claims;
- timely respond to motions filed against client;
- file appropriate pleadings to strip or avoid liens; and
- provide any other legal services necessary for administration of the case.

Central District of Illinois

Each division in the District has a standing order regarding "no look" fees as to Chapter 13 cases but of particular note is the order of Chief Judge Mary P. Gorman of the Springfield Division[9], which outlines counsel's affirmative responsibilities as follows:

> *The duties designated below are presumed to be included within the scope of services rendered by the attorney to the debtor. If an attorney fails to perform any required duty, the Court, upon notice and hearing, may order the attorney to disgorge all or part of any fees received. Upon request of an interested party or sua sponte, the Court may consider whether an attorney's fees should be limited to an amount less than $3500 based on the circumstances of a particular case.*
>
> *The debtor's attorney's duties in a Chapter 13 case include, but are not necessarily limited to, the following:*
>
> *1. Consult with and advise the debtor about the differences and relative advantages and disadvantages of proceeding under Chapter 7 and Chapter 13.*
> *2. Prepare and file the petition, statement of financial affairs, all schedules, and the creditor matrix.*
> *3. Prepare and file a Chapter 13 plan.*
> *4. Upon information received from the debtor, take all action necessary to avoid the termination of, or to require the reinstatement of, necessary utility services for the debtor.*
> *5. File the necessary pleadings to obtain the return of repossessed vehicles proposed to be retained by the debtor under the plan.*
> *6. In the event of pending state or federal court litigation, notify creditors' attorneys, and appropriate courts in which the litigation is pending, of the bankruptcy filing and the existence of the automatic stay.*
> *7. Send out an information letter to the debtor reminding the debtor to attend the §341 meeting, specifying the date, time, and location of the meeting, and providing information advising the debtor as to all necessary preparations for the §341 meeting.*
> *8. Collect from the debtor and deliver to the trustee all information required by statute to be provided prior to the §341 meeting.*
> *9. Appear at the §341 meeting with the debtor.*

[9] http://www.ilcb.uscourts.gov/sites/ilcb/files/general-ordes/feeorder2014.pdf

10. Upon information received from the debtor, take steps necessary to terminate pending wage garnishments.
11. Attend all court hearings in the case.
12. Prepare all court mandated pre-trial statements, reports, briefs, etc.
13. Respond to objections to plan confirmation and, where necessary, prepare amended plans.
14. Prepare, file, and serve necessary amended statements and schedules, in accordance with information submitted by the debtor, provided the debtor pays any required filing fees.
15. Prepare, file, and serve necessary motions to buy, sell, or refinance real property and vehicles, when appropriate.
16. Review all claims promptly after the expiration of the claims bar date and file claims for creditors who failed to file claims, if it is in the debtor's best interest to do so.
17. Object to claims which should be disallowed in whole or in part.
18. Advise and represent the debtor with respect to motions for relief from the automatic stay, for adequate protection, to terminate the co-debtor stay, and other contested matters.
19. Prepare, file, and serve motions to avoid liens on real or personal property.
20. Upon information received from the debtor, contact creditors who continue to communicate with the debtor after filing.
21. Upon completion of plan payments, file a Certificate of Domestic Support Obligation if debtor was required to pay a domestic support obligation during the pendency of the case.
22. Provide such other legal services as are necessary for the administration of the case.

Note that this comprehensive list is quite similar to that of the Northern District of Illinois. We will see additional similarities in other districts later in these materials.

Southern District of Illinois

ILSB Local Rule 2092, recited in the Chapter 7 portion of these materials, applies in Chapter 13 cases as well.

Perhaps the most comprehensive, or demanding, list of responsibilities of Chapter 13 debtors' counsel is found in the Southern District of Illinois' Chapter 13 Procedure Manual[10] as Appendix A. The list of responsibilities and duties of counsel are:

Before the bankruptcy petition is filed, the attorney will provide the following legal services:

1) The Debtor shall meet with an attorney for a reasonable period of time prior to the filing of the bankruptcy petition to review facts and to receive advice concerning the Debtor's bankruptcy and non-bankruptcy options and shall be present at the signing of the final documents.

2) Unless an emergency filing is necessitated by exigent circumstances, the Debtor's counsel must collect the following documents from the Debtor prior to filing, or document the inability to collect the same, subject to subparagraph (o) below:

[10] http://www.ilsb.uscourts.gov/sites/default/files/forms/13PlanInstruct_120111.pdf

a) Copies of all bank account statements (or similar documentation) from at least 60 days prior to the date of the filing of the bankruptcy petition (savings, checking, CD's etc.).
b) Federal income tax returns, transcripts, or a completed affidavit declaring that the Debtor was not required to file tax returns for the tax year prior to the filing of the bankruptcy petition.
c) Federal income tax returns, transcripts, or a completed affidavit declaring that the Debtor was not required to file tax returns for the second through fourth years prior to the filing of the bankruptcy petition.
d) A copy of all payment advices or other evidence of payment the Debtor received within 60 days before the date of the filing of the petition from any employer of the Debtor, or an affidavit that no income was earned.
26
e) A copy of all payment advices or other evidence of payment the Debtor received within the six calendar months prior to filing the petition sufficient to calculate the Debtor's current monthly income pursuant to § 101(10A).
f) If the Debtor is self-employed, a profit and loss statement for the six months before the filing of the petition.
g) Copies of all billing statements for the Debtor's credit cards, medical bills, student loans, personal/payday loans, car loans, mortgages and other secured debts. Also, any utility bills on which the Debtor is not current. If the Debtor does not have a bill for a debt, the Debtor must provide a written statement of the (i) creditor's name, (ii) billing address, (iii) account number and (iv) amount owed.
h) A copy of any domestic support order that the Debtor has been ordered to pay.
i) Copies of final and signed divorce decrees and marital settlement agreements entered into in the two years prior to filing the bankruptcy petition.
j) Copies of any and all documentation concerning lawsuits or administrative proceedings the Debtor has been involved in within the last two years, regardless of the status or outcome of the suit.
k) If applicable, a statement from the county showing the current status of the Debtor's real estate/mobile home taxes. If the taxes have been purchased, the Debtor should provide a copy of the redemption certificate.
l) Copies of the most recent non-term life insurance statements in which the Debtor has an interest.
m) Copies of current statements regarding any non-retirement investments in which the Debtor has an interest.
n) Verification/information of the balance of any and all 401(k) loans.
o) If any of these documents are not available or present in the Debtor's counsel's file, then the Debtor and the Debtor's counsel should execute an affidavit stating that they both made reasonable efforts to obtain the documentation and were unable to comply. The affidavit must also list the documents not obtained.

3) The Debtor's counsel must complete an intake document which is reasonably detailed to ensure that the Debtor is asked the appropriate questions and given appropriate advice. There is no form intake document approved by the Court at present.

4) The Debtor's counsel must ensure that the Debtor has completed the required pre-petition credit counseling requirements or determine if the Debtor meets the standard for one of the exceptions to such requirements.

5) The Debtor's counsel must review the petition, schedules, supplemental local forms, Chapter 13 Plan and mailing matrix prior to the filing of said documents.

6) The Debtor's counsel must meet with the Debtor when they sign the final paperwork to be filed in their case.

7) The Debtor's counsel must review and sign all motions filed in the Debtor's case.

8) The Debtor's counsel shall timely provide the Debtor with a written executed contract that conforms to the requirements in the Bankruptcy Code and Rules.

After the bankruptcy petition is filed, the attorney will provide the following legal services:

1) Upon information received from the Debtor, take steps necessary to avoid the termination of, or to allow the reinstatement of, the Debtor's necessary utility services by providing faxed proof of filing of the petition to utility service creditors.

2) Take steps necessary to obtain the return of repossessed vehicles, which are necessary to the estate, including, but not limited to, the filing of Complaints to Compel Turnover.

3) In the event of pending state or federal court litigation, notify creditor's attorneys and the appropriate court in which the litigation is pending that the bankruptcy case has been filed.

4) Send out an information letter to the Debtor reminding the Debtor to attend the § 341 meeting, specifying the time and location of that meeting, and advising the Debtor as to the procedures of the § 341 meeting.

5) Appear at the § 341 meeting of creditors with the Debtor, confer with the Debtor to prepare him or her for the § 341 meeting, and advise the client to cure any arrears on Plan payments. Counsel will appear at all meetings dressed in professional attire.

6) Upon information received from the Debtor, take steps necessary to terminate pending wage garnishments, including filing a Motion to Terminate Garnishment.

7) Attend all court hearings relating to the Debtor's case, excluding adversary proceedings in which counsel is not retained.

8) Prepare and conduct all court mandated pre-trial conferences, reports, briefs, etc.

9) Address objections to Plan confirmation and, where necessary, prepare an Amended Plan.

10) Prepare, file, and serve necessary modifications to the Plan, which may include suspending, lowering, or increasing Plan payments.

28

11) Prepare, file, and serve necessary amended statements and schedules, in accordance with information submitted by the Debtor, provided the Debtor pays the Court's filing fee, unless the amendment or omission was due to the fault of Debtor's counsel.
12) Prepare, file, and serve necessary motions to buy, sell, or refinance real property when appropriate.
13) Review all proofs of claims filed and, if appropriate and in the Debtor's best interest, object to improper or invalid claims.
14) Timely file proofs of claims for creditors who fail to file claims if it is in the Debtor's best interest to file such a claim.
15) Represent the Debtor in motions for relief from stay and file an objection to such motions, if appropriate.
16) Where appropriate, prepare, file, and serve necessary motions to avoid liens on real or personal property.
17) Upon information received from the Debtor, contact creditors who continue to communicate with the Debtor after filing, by phone or in writing, and, if necessary and appropriate, file motions for sanctions, prepare testimony and exhibits, and appear for hearing.
18) If necessary, contact tax authorities or other third-parties to gather information necessary for the case. However, such contact shall not include the obtaining of the names, addresses, account numbers and other information necessary for the inclusion and filing of creditors on any schedule of the petition, as it is the duty of the Debtor to provide such information to counsel for the preparation of accurate bankruptcy schedules.
19) These rights and responsibilities do not include a requirement to represent the Debtor in an adversarial proceeding and the Debtor's attorney may require additional fees which must be approved by the Court.
20) Communicate with the Debtor – either by phone or by being available for office appointments – to discuss pending issues or matters in the present case.
21) Provide such other legal services as, in the attorney's sound judgment, are necessary for the prompt administration of the case before the Bankruptcy Court. Nothing contained herein shall be construed to bind the attorney to perform work that has no basis in law or fact or constitutes extraordinary proceedings within the context of a normal chapter 13 proceeding, such as adversary proceedings or other work that exceeds the scope of the attorney-client contract.

By providing the foregoing services in non-business cases, counsel will be awarded the "flat fee" of $4,000.00.

Of additional interest are the following excerpts from the Manual:

Part I, Section 5: *Maximum Attorney's Fees for Cases Converted Pre-Confirmation*
Notwithstanding counsel's fee selection (flat fee or fee application) for representation of the Debtor(s) in a Chapter 13 proceeding, absent leave of Court, counsel is prohibited from receiving more than $1,500.00 in attorney's fees for any case that converts, prior to confirmation, to a proceeding under Chapter 7. Unless otherwise ordered, upon entry of

an Order of Conversion, the Chapter 13 Trustee shall use any remaining funds received pre-conversion to pay the balance of attorney's fees up to $1,500.00. The remaining monies on hand shall be refunded back to the Debtor.
If Debtor's counsel has previously been paid more than $1,500.00, upon the entry of an Order of Conversion, the Trustee shall file a Statement of Attorney's Fees Disbursed by the Chapter 13 Trustee.

Part I, Section 11 D: *Attendance at Hearings on Objections to Plans Amended After Confirmation.*
The Debtor's attorney or the Debtor, if not represented by an attorney, and any party objecting to the Amended Plan shall attend the hearing set on such objections. The parties may contact the courtroom deputy in order to request an excused absence if an agreement has been reached prior to the hearing date, and if the Court is informed of this agreement by 3:30 p.m. the business day before the hearing. Absent such an excuse, failure to appear at the hearing may result in the entry of an order overruling the objection or entry of an order denying approval of the Amended Plan, and may subject counsel to further sanctions by the Court.

Part II, Section 2 (paragraph 2): *Attorney's Fees and Responsibilities*
The Debtor shall indicate in this section whether the Debtor's attorney shall be paid a flat rate for representation during the entire case (with certain exceptions) or by filing a fee application.

Part II, Section 2 C: *The Debtor's and Attorney's Rights and Responsibilities*
Each Debtor and his or her counsel must execute a Rights and Responsibilities Form setting forth the minimum preparation and duties to be performed by the Debtor's counsel throughout the Chapter 13 bankruptcy. See Appendix A.
Failure to meet the requirements of the Rights and Responsibilities Form may result in any sanction the Court finds appropriate and reasonable under the circumstances including, but not limited to, disgorgement of fees and/or suspension of the attorney's right to practice before the Bankruptcy Court in this District.

Northern District of Indiana

There don't appear to be any additional requirements of counsel in Chapter 13 cases other than those set forth in ND Ind LBR B-9010-2, which addresses appearances and the duration of same.

Southern District of Indiana

The district utilizes a form similar to those cited previously in these materials concerning the responsibilities of counsel in representing Chapter 13 debtors. The form is referenced in SD Ind B-2016-1, which provides:

(b) Chapter 13 Cases

The following are guidelines for the circumstances under which the Court will, as part of the Chapter 13 plan confirmation process, approve fees of attorneys representing a

Chapter 13 Debtor ("Counsel"). Counsel shall file a proof of claim both for fees awarded pursuant to these guidelines and for fees awarded after application.

Counsel may decline to seek approval of compensation pursuant to these guidelines. If Counsel so declines, compensation shall be disclosed, reviewed, and approved in accordance with applicable authority including, without limitation, 11 U.S.C. §§329 and 330 and Fed.R.Bankr.P. 2002, 2016 and 2017. This authority requires, at a minimum, that payments on account of post petition services be held in trust until the Court approves the fees and expenses of the attorney.

Alternatively, Counsel may have fees approved and paid as part of the Chapter 13 plan confirmation process if they comply with the following guidelines.

(1) Counsel may seek approval for fees up to the amounts set forth in section (2) without filing a detailed application if:
   (A) Counsel has filed an executed copy of the "Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys," available on the Court's website.
   (B) No objection to the requested fees has been raised.
   (C) A proof of claim has been filed with the Court by Counsel and served upon the trustee.
(2) The maximum fee which can be approved through the procedure described in section (1) is set by general order[11].
(3) If Counsel does not wish to obtain approval of fees in accordance with these guidelines, if an executed copy of the "Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys" is not filed, if Counsel requests fees in excess of the amounts in section (2), or if there is an objection to use of these guidelines, fees will not be automatically approved upon plan confirmation pursuant to these guidelines. In such cases, Counsel must deposit all advance payment of post petition fees in trust, must apply for all fees, and shall comply with 11 U.S.C. §§ 329 and 330 and Fed.R.Bankr.P. 2002, 2016 and 2017.
(4) If Counsel has filed an executed copy of the "Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys," but the maximum fee in (b)(2) above is not sufficient to fully compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The application shall be accompanied by time records supporting the additional fees or by an affidavit explaining why the standard fee is inadequate in the case.
(5) Except for pre-petition retainers, all fees shall be paid through the plan unless otherwise ordered. Absent Court authorization, Counsel may not receive fees directly from the Debtor other than the pre-petition retainer. After plan confirmation, the trustee shall pay Counsel until the fee is paid in full.
(6) If Counsel has elected to be compensated pursuant to these guidelines but the case is converted or dismissed prior to confirmation of a plan, absent contrary orders, the trustee shall pay to the Counsel, to the extent funds are available and subject to the trustee's percentage fee, an administrative claim equal to 50% of the unpaid fee balance if a properly documented fee claim (for the entire fee balance)

[11] General Order 12-0001. http://www.insb.uscourts.gov/WebForms/genorder/120001.pdf.

has been filed by Counsel and served upon the trustee. Under appropriate circumstances, Counsel may file an application (within fourteen [14] days of the dismissal or conversion) for allowance and payment of additional fees. The application shall be accompanied by an affidavit supporting award of the amount requested. Counsel shall not collect, receive, or demand additional fees from the Debtor for work already performed unless authorized by the Court, even after dismissal.

(7) On its own motion or the motion of any party in interest at any time prior to entry of a final decree, the Court may order a hearing to review any fee paid or to be paid.

Northern District of Iowa

In an order entered in In re Matson[12], the Court recited that the base amount, $3,001.00 as of the date of the opinion[13], is appropriate to cover the routine services to be rendered in a Chapter 13 through confirmation, those services include "counseling the debtors; preparing and filing the debtors' petition, schedules, and Chapter 13 plan; attending the creditors' meeting and the confirmation hearing; reviewing claims; and filing amendments and motions related to the Chapter 13 plan." J. Collins citing *In re Cookinham*, No. 06-01033, slip op at 2 (Bankr ND Iowa Mar 29, 2007). So, while not a rule, certainly of importance in conjunction with LR 2016-1(b).

Southern District of Iowa

The local rules, orders, and forms are silent as to specific services to be rendered by Debtor's counsel.

Eastern District of Michigan

Local Bankruptcy Rule 2016-1 includes a subsection indicating that a Chapter 13 Order Confirming Plan may provide for up to $3,500.00 in compensation without the necessity of an application; of note however is that this amount exceeds the maximum currently allowable in the Detroit location, which is currently $3,000.00. The amount set forth in the rules is said to account for future increases.[14] The rule does not, however, provide a list or other written guide as to the specific services that should be provided in exchange for that fee. Of additional note is that at least one trustee has been known to request counsel to file an application for compensation despite counsel electing to accept the "no look" fee in situations in which the trustee does not believe counsel has fully or appropriately represented the debtor during the pre-confirmation period.

Western District of Michigan

The local rules, orders, and forms are silent as to specific services to be rendered by Debtor's counsel.

[12] Order dated and entered May 25, 2010 in case number 07-00941, ND Iowa.
[13] http://www.ianb.uscourts.gov/content/?q=node/4111
[14] Per Judge Walter Shapero, "Bench & Bar Seminar on the New EDM Local Bankruptcy Rules" provided jointly by the Consumer Bankruptcy Association and the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar on April 11, 2008 (Offices of Trott and Trott).

District of Minnesota

Local Rule 1007-3-1 requires that "[i]n any chapter 7 or chapter 13 case in which the debtor is represented by an attorney, the debtor shall file with the petition a Notice of Responsibilities, including a scanned image of the signature page signed by the attorney and the debtor(s). The Notice of Responsibilities shall conform to Local Form 1007-3-1(7) in chapter 7 cases and Local Form 1007-3-1(13) in chapter 13 cases."

The Notice of Responsibilities form for Chapter 13 matters is substantially similar to the forms used in other Districts previously identified in these materials. The form is located on the Court's website under their local forms link.[15]

Northern District of Ohio

There are several Administrative Orders[16] in place which specifically address fees to be paid, and services to be performed, in a Chapter 13 case.

An excerpt from one of the orders, quite similar to other districts addressed elsewhere in these materials:

> *As guidelines, the Court contemplates that the following matters will be included in the fee allowed under paragraph 3:*
> *(a) Personally meeting with the debtor to review the debtor's financial situation and to counsel the debtor regarding filing under either Chapter 7 or Chapter 13.*
> *(b) Analyzing the debtor's financial situation, assisting the debtor in understanding the debtor's rights and obligations throughout the pendency of the case, and assessing potential issues in the particular bankruptcy, including but without limitation, exemptions, automatic stays, and dischargeability and avoidance matters.*
> *(c) All conferences with the debtor, including timely responses to debtor inquiries, whether by telephone or in writing.*
> *(d) Preparation of the bankruptcy petition (including emergency petitions), schedules, statement of financial affairs, Form B22C, Chapter 13 plan, and all documents required to be filed pursuant to 11 U.S.C. § 521.*
> *(e) Negotiation and communication with priority and secured creditors, including the Internal Revenue Service.*
> *(f) Representation of the debtor at the meeting of creditors under 11 U.S.C. §341 and any continued meeting.*
> *(g) Responding to inquiries made by the debtor and the Chapter 13 Trustee in furtherance of the administration and/or prosecution of the Chapter 13 Plan.*
> *(h) Preparation of documents and notices, including submissions based upon Trustee recommendations, the filing of suggestion of bankruptcy, routine objections to claims, amendments to schedules, voluntary dismissals, and all case related correspondence.*
> *(i) Responding to routine objections to plan confirmation, and, when*

[15] http://www.mnb.uscourts.gov/Newsite/Rules_Forms/forms/CH13NoticeofResponsibilites.pdf
[16] See the chart following later in these materials.

necessary, preparing, filing, and serving an amended plan.
(j) Representation of the debtor at any and all confirmation hearings, but not including an evidentiary hearing.
(k) Representation of the debtor in connection with at least one 11 U.S.C. § 362(c)(3) or (c)(4) motion, and at least two other 11 U.S.C. §362 motions – one concerning the debtor's residence and one concerning a vehicle, but not including an evidentiary hearing upon these matters.
(l) Representation of the debtor on motions to avoid liens.
(m) Representation of the debtor on one motion to reinstate stay.
(n) Representation of the debtor on one motion to reinstate case.
(o) Representation of the debtor on routine objections to claims.
(p) Providing such other legal services as are necessary for the administration of the case, including but not limited to, continuing to assist the debtor by returning phone calls, answering questions, and reviewing and sending correspondence.

Additionally, the Canton, Cleveland, and Youngstown locations of the Court have a local form entitled Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys[17], the contents of which are consistent with the Administrative Orders.

Southern District of Ohio

LBR 2016-1(b)(2) provides that in exchange for accepting the "flat fee", counsel shall perform the following duties through confirmation of a Chapter 13 Plan:

…whether performed preconfirmation or postconfirmation:

(i) analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether, and under what chapter, to file a petition in bankruptcy;
(ii) preparation and filing of the petition, schedules, statement of financial affairs and amendments thereto that may be required;
(iii) preparation and filing of the chapter 13 plan, and any preconfirmation amendments thereto that may be required;
(iv) preparation and filing of payroll orders and amended payroll orders;
(v) representation of the debtor at the meeting of creditors and confirmation hearing; and at any adjournments thereof;
(vi) filing of address changes for the debtor;
(vii) routine phone calls and questions;
(viii) review of claims;
(ix) review of notice of intention to pay claims;
(x) preparation and filing of objections to non-real estate and nontax claims exclusive of any hearings;
(xi) preparation and filing of first motion to suspend or temporarily reduce plan payments;
(xii) preparation and filing of debtor's certification regarding issuance of discharge order; and

[17] https://www.ohnb.uscourts.gov/; research and forms link; bankruptcy forms link.

(xiii) any other duty as required by local decision or policy.

See also local form 2016-1(b).

Eastern District of Wisconsin

The local rules, orders, and forms are silent as to specific services to be rendered by Debtor's counsel.

Western District of Wisconsin

The local rules, orders, and forms are silent as to specific services to be rendered by Debtor's counsel.

The Districts

As is evident in these preceding materials, each district has its own rules and practices regarding counsel's responsibilities to a debtor in a consumer bankruptcy case. Though most rules speak directly to what counsel must include, absence of an aspect or service provided in a consumer case may imply that such a service may be properly unbundled. The following is a chart of the rules, administrative or standing orders, local forms, and additional resources identified both in the preceding sections as well as of additional interest or application to compensation agreements.

	District Court – Admin Order	District Court – Local Rule	Bankruptcy Court – Admin Order	Bankruptcy Court – Local Rule
Illinois – Northern	--	LR 54.3*	--	LBR 2090-5 B, D; LBR 5082-1 (Ch 7); LBR 5082-2 (Ch 13); See also LBR 2091-1 B *See also Local Bankruptcy Forms for applications for compensation.*
Illinois – Central	--	CDIL-LR 54.1*	Standing Orders dated 1/1/2014 for each division; see also Standing Order dated 1/1/2010 for Danville Division.	None
Illinois – Southern	--	--	Chapter 13 Procedure Manual	ILSB LR 2016-1; ILSB LR 2092 C
Indiana – Northern	--	--	--	ND Ind LBR B-4008-1 ND Ind LBR B-9010-2
Indiana – Southern	--	--	General Order 12-0001, dated 05/15/2012, pertains to Chapter 13 cases only.	SD Ind B-2016-1(b)(2) in Chapter 13 cases. SD Ind B-4008-1(c)
Iowa – Northern	--	--	--	LR 2016-1(b) See also LR 2091-1

Iowa – Southern	--	--	None[18]	None[19]
Michigan – Eastern	--	ED Mich LR 83.25*		LBR 2016-1; See also Guideline 13
Michigan – Western	--	--	Memorandum Regarding Allowance of Compensation and Reimbursement of Expenses for Court-Appointed Professionals[20]	LBR 2016-1 (and incorporates AO 2009-2); LBR 2016-2[21]
Minnesota	--	LR 83.7*	Local Form 1007-3-1(7); Local Form 1007-3-1(13); Local Form 2016-1	Local Rule 1007-3-1; See also Local Rule 2016-1 and Local Rule 4008-1.
Ohio – Northern	--	LR 83.7*	Administrative Order 07-2[22] (Cleveland); Administrative Order 14-01 (Canton), see also 08-05; Administrative Order 12-03 (Eastern Division); Administrative Order 14-02 (Youngstown) xxx	Rule 2016-1; *Guidelines for Compensation and Expense Reimbursement of Professionals*[23], by reference in the Rule.
Ohio – Southern	--	SD Ohio Civ R 83.4*	LBR Form 2016-1(b)	LBR 2016-1; See also LBR 2091-1
Wisconsin – Eastern	--	--	--	LR 2016; See also Appendix to Local Rules: *Presumed Reasonable Fees as of 1 Dec-2011*[24]; LR 9010.1
Wisconsin – Western	--	--	--	--

**indicates the rule is not found to be bankruptcy-specific and is included for reference purposes only.*

[18] General Order 1998-1, "Order Compensation Debtor's Counsel, Chapter 13 Cases" was revoked by General Order 2003-1. A review of 2003-1 does not specifically address or provide an alternative to the subject matter of 1998-1.
[19] General Order 2003-1; "(4)Effective August 4, 2003 this Court's current local rules are abolished."
[20] http://www.miwb.uscourts.gov/cms/assets/Home/Court-News/Fee-Guidelines.pdf
[21] These rules do not specify counsel's duties or responsibilities but speak to applications for compensation.
[22] Other Administrative Orders have been omitted as inapplicable today due to the restriction of dates to which they applied.
[23] https://www.ohnb.uscourts.gov/AttyInfo/2011_Guidelines_for_Compensation.pdf
[24] http://www.wieb.uscourts.gov/index.php/orders-rules/rules/local-rules16.

A Sampling of Additional Details

Northern District of Illinois

> RULE 2090-5 APPEARANCES, B. Appearance of Attorney for Debtor; Adversary Proceedings. Counsel who represents the debtor upon the filing of a petition in bankruptcy is deemed to appear as attorney of record on behalf of the debtor for all purposes in the bankruptcy case, including any contested matter and any audit, but is not deemed to appear in any adversary proceeding filed against the debtor.

While included here from the local rules of the Northern District of Illinois, it appears that each district considered in these materials has a similar requirement of counsel in, at least, the main bankruptcy case, once an appearance has been entered.

Central District of Illinois

Chief Judge Mary P. Gorman's Procedures for Cases Filed in the Springfield Division states, "…every attorney who appears for a debtor must file a fee disclosure even if the attorney is not receiving or requesting additional fees. See 11 U.S.C. §329(a); Fed. R. Bankr. P. 2016(b)…." and further, that "[t]he Court strictly enforces the requirements set forth in the Bankruptcy Code and Rules regarding applications for an award of professional fees and expenses. See 11 U.S.C. §330; Fed.R.Bankr.P. 2016; In re Vancil Contracting, Inc., 2008 WL 207533 (Bankr. C.D. Ill. Jan. 25, 2008); In re Minich, 386 B.R. 723 (Bankr. C.D. Ill. 2008)."

Judges Altenberger, Fines, and Perkins do not have standing procedures posted on the Court's website. Counsel are advised to contact their chambers for further information.

Northern District of Indiana

The local bankruptcy rules in this district speak only to the entry of an appearance and that withdrawal by court order is required to cease representation.

Southern District of Indiana

Attorneys must file a proof of claim in this district to receive compensation from the debtors' estate.

Western District of Michigan[25]

While not required by the State Bar of Michigan or formally required by this federal bar, it has long been the practice of the bench in this district to require counsel to attend continuing education programs. This "requirement" is enforced through the Court's review of applications for compensation. So, though a formal written list of services to be provided is not promulgated by the rules or administrative order, one may argue that such services will be provided by attorneys who maintain current educational experience through continuing legal education programming.

[25] Though admitted, this author does not currently practice in the Western District of Michigan and therefore has no personal knowledge of this requirement; only that which has been reported to her over the last several years by local colleagues who do practice in this district.

Northern District of Ohio

The Court's website includes a page dedicated to Attorney Information. The Attorney Information page includes a link to a pdf document entitled Guidelines for Compensation and Expense Reimbursement of Professionals, which outlines proper drafting of applications for compensation.[26]

Southern District of Ohio

LBR Form 2016-1(a)(1)(C) is a notice of an application for compensation. This appears to be used in conjunction with a formal application filed pursuant to LBR 2016-1(b) or (c), applicable to Chapter 13 cases. LBR 2016-1(b) sets forth detailed list of services that must be or have been rendered to a debtor in the course of representation pre-confirmation in order for counsel to seek the "unitemized fee".

Eastern District of Wisconsin

While there don't appear to be any forms or rules outlining the responsibilities of counsel in representing debtors in this district, the author did find a couple of items of particular interest, if only as they relate in a roundabout way to the topic at hand:

- Local Rule 9010.1 requires any attorney who contributes substantially to any pleading or other document to be filed with the court to disclose his or her contact information on the first page of the pleadings.

- Lastly, at least two of the four judges in this district do not require debtor's counsel to participate in reaffirmation hearings. The court's website is silent as to the other two judges.

Conclusion

Though not exhaustive, it is this author's intention that these materials have provided the practitioner with sufficient information and resources to assess what is required of them in the representation of the Chapter 7 or Chapter 13 consumer debtor, which may assist in determining what, if anything, may be unbundled in each case.

[26] https://www.ohnb.uscourts.gov/AttyInfo/2011_Guidelines_for_Compensation.pdf

A LOOK AT CASE LAW

By

Deborah K. Ebner
Law Office Deborah Kanner Ebner
11 East Adams Street
Chicago IL
www.deborahebnerlaw.com

Ms. Ebner gratefully acknowledges the research assistance of Michelle Freeman, a 2014 graduate of the University of Michigan School of Law

I. CHAPTER 7 DEBTOR'S COUNSEL WHO IS NOT RETAINED BY TRUSTEE MAY NOT RECEIVE COMPENSATION FROM THE ESTATE:

- **Lamie v. United States Trustee, 540 U.S. 526 (2004)**

Justice Kennedy, delivering the opinion for the Court, held that § 330(a)(1) of the Bankruptcy Code governing compensation of professionals does not allow a Chapter 7 debtor's attorney to be compensated from the estate unless the attorney is appointed by the trustee as authorized by § 327 of the Code. Petitioner, a bankruptcy attorney, sought compensation under this section for legal services he provided to a bankrupt debtor after the proceeding was converted from a Chapter 11 to a Chapter 7 bankruptcy. The Court affirmed the rulings of the Bankruptcy Court, District Court, and Fourth Circuit, which all held that in a Chapter 7 proceeding § 330(a)(1) does not authorize payment of attorney's fees unless the attorney has been appointed under § 327. The uncertainty in this case arises from Congress's decision to reform the Code in 1994. The reform Act altered § 330(a) by deleting "or to the debtor's attorney" from what was § 330(a) and is now § 330(a)(1). The Court determined that the plain meaning of § 330(a)(1) did not lead to absurd results; and therefore, it would not read "attorney" in § 330(a)(1)(A) to refer to "debtors' attorneys". Furthermore, the Court stated that compensation for debtors' attorneys in Chapter 7 proceedings is not altogether prohibited. While § 330(a)(1) requires proper authorization for payment to attorneys from estate funds in Chapter 7 filings, the requirement does not extend throughout all bankruptcy law. Section 330(a)(1) does not prevent a debtor from engaging in the common practice of paying counsel compensation in advance to ensure that a bankruptcy filing is in order.

- **In re Griffin, 313 B.R. 757 (Bankr. N.D. 2004) – See below.**

II. ATTORNEY FEES DUE DEBTOR'S COUNSEL ARE SUBJECT TO BANKRUPTCY DISCHARGE IN CHAPTER 7

- **Bethea v. Adams & Associates, 352 F.3d 1125 (7th Cir. 2003)**

The Seventh Circuit held that Chapter 7 prepetition debts for legal fees are subject to discharge and any attempt to collect such fees is a violation of the automatic stay. In other words, § 329 of the Code does not protect reasonable attorney's fees from discharge. The Court ruled that the debtors' attorneys' had to refund to the debtors any funds collected after the discharge was entered as well as those funds received prior to discharge but after filing. Section 727(b) provides that a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief, except as provided in § 523. Attorney's fees are not listed as an exception to § 727's discharge provisions. Chapter 7 retainers, agreed to by the debtor and debtor's attorney, that cover the legal services used for preparing and prosecuting debtor's bankruptcy proceedings, constitute prepetition, liquidated debt for discharge purposes. Furthermore, the Seventh Circuit did not share the view of petitioning attorneys' that its reading of § 727 would prevent deserving debtors from receiving legal services, arguing in the alternative that debtors who cannot prepay in full can tender a smaller retainer for prepetition work and later hire and pay counsel once the proceeding begins. The Court rejected the intermediate position articulated by the Ninth Circuit in *In re Hines,* 147 F.3d 1185 (9th Cir.1998), wherein work done during the bankruptcy process is immune from discharge, as well. The Seventh Circuit refused to distinguish between pre and post work and fees, determining instead that all fees not collected prepetition are discharged. Accordingly, the most a bankruptcy court is allowed to do is give administrative priority to post-petition fees for work relating to the prosecution of the case. That being said, if the debtor's estate is insufficient to pay administrative claims then those fees are discharged as well.

- **Ritterhouse v. Eisen, 404 F.3d 395 (6th Cir. 2005)**

The Sixth Circuit, addressing an issue of first impression, held that in a Chapter 7 proceeding unpaid, prepetition attorney fees are discharged by the bankruptcy judgment. The Court explained that § 727(b) provides that a discharge under Chapter 7 relieves a debtor of all debts incurred prior to the filing of a petition for bankruptcy, except those nineteen categories of debts specifically enumerated in 11 § 523(a). A debt for prepetition legal services is not one of the non-dischargeable debts enumerated in § 523(a).

- **In re Griffin, 313 B.R. 757 (Bankr. N.D. 2004)**

According to the Supreme Court's ruling in *Lamie*, debtors' attorneys can only be compensated under § 330(a)(1) if the trustee, pursuant to § 327, employs the attorneys. In the instant case, the trustee never retained or otherwise authorized counsel to represent the Chapter 7 debtors' in their motion to redeem their motor vehicle; and therefore, counsel is not eligible for compensation from the estate under § 330. Furthermore, the Court found two independent reasons for disgorgement of fees; first the law firm was barred by automatic stay from attempting to collect any installment payments or fees for alterative services from debtors on prepetition claims; and second, the law firm's failure to timely supplement its fee disclosure, to reveal that it had received a $600 fee for its legal work in representing debtors' in connection with their redemption motion. Additionally, the Court stated that defective fee disclosure by counsel is not a minor matter; rather, an attorney's failure to provide the required disclosure will alone justify a bankruptcy court's denial of any or all fees requested. Under § 329(b), if compensation paid to debtor's counsel exceeds the reasonable value of such services, the court may cancel the agreement or order the amount considered excessive to be returned. This requirement underscores the importance of disclosure; and yet, the Court cannot review the transaction

between debtor and his attorney or order a remedy under § 329 if it is never aware that the transaction existed or is kept in the dark regarding its details. Finally, the Court raised concerns about the Seventh Circuit's decision in *Bethea*, specifically the possibility of allowing the debtor to rehire his bankruptcy counsel after the Chapter 7 petition is filed in order to perform post-petition services in light of Rules 1.7 and 1.8 of Illinois Rules of Professional Conduct.

III. UNBUNDLING PREPETITION SERVICES FROM POST PETITION SERVICES IS NOT PER SE PROHIBITED BY THE RULES OF PROFESSIONAL CONDUCT IN A CHAPTER 7

- **In re Slabbinck, 482 B.R. 576 (Bankr. E.D Mich. 2012)**

In *Slabbinick*, the debtor signed two separate fee agreements, one prepetition and one post-petition. The court looked to the Michigan Rules of Professional Conduct (MRCP) to determine whether, in a Chapter 7 case, unbundling legal services performed prepetition from services performed post-petition violated an attorney's obligation to provide competent representation to a client. After reviewing the MRPC, the Official Comments to the MRPC, and two Michigan Ethics Opinions (RI–184 and RI–384), the court held that "an agreement to limit an attorney's legal services in connection with an individual Chapter 7 bankruptcy case by unbundling the prepetition legal services from the post-petition legal services is not *per se* prohibited by the MRPC." The court clarified that a prepetition agreement to pay an attorney gives rise to a dischargeable debt, but a post-petition agreement does not. A Chapter 7 debtor's attorney may bifurcate legal services as long as he or she competently performs those services that the debtor has hired the attorney to perform, provides an adequate consultation, and obtains fully informed consent to such arrangement. From the Court's perspective, to insist on an all or nothing approach, in the name of promoting attorneys' competence, would deprive individual debtors of access to the bankruptcy process.

IV. UNBUNDLING NOT PERMITTED IN CHAPTER 7

- **In re Collmar, 417 B.R. 920 (Bankr. N.D. Ind. 2009)**

The issue before the Court is whether debtor's counsel can contract around services it agreed to provide the debtor in Chapter 7 proceedings; specifically whether debtors' counsel can permissibly exclude reaffirmation agreements from the scope of its representation. Previous decisions have emphasized that an attorney's representation of a debtor is for the entire bankruptcy process, and not simply for various steps along the way unless there is a compelling reason or exceptional circumstance for withdrawal of counsel. Here, the Court concluded that debtor's counsel could not contractually limit the scope of representation without the debtor's informed consent. Since there was no evidence of consent and the reaffirmation agreement was completed without the participation of debtor's counsel, the court could not approve it. The court expressed in dicta that the decision to reaffirm an otherwise dischargeable debt is a critical part of bankruptcy process, so critical that to provide competent representation, counsel must advise a chapter 7 debtor about the reaffirmation process.

- **In re Egwin, 291 B.R. 559 (Bankr. N.D. GA. 2003)**

* Note this case has not been overturned, but the *Slabbinck* decision disagrees with the central holding.

In this case, counsel represented the debtors' when they filed their Chapter 7 petition, but appeared *pro se* in the following two proceedings. The Court *sua sponte* issued an order for the attorney to show cause why sanctions should not be imposed for failure to represent the debtors'. The decision considers three issues concerning an attorney's representation of a Chapter 7 Debtor: 1) whether an attorney may limit the scope of representation of a chapter 7 debtor by

excluding certain matters; 2) the duties of an attorney, regardless of the arrangement between the debtor and the lawyer, until the court grant's permission to withdraw; and 3) under what circumstances will the court grant leave to withdraw when the reason is the debtor's payment of attorney's fees. As to the first issue, the Court held that an attorney representing a Chapter 7 debtor in an ordinary case may not limit the scope of that engagement, particularly when the debtor has not given informed consent. As to the second issue, the Court held that a debtor's attorney is obligated by rules of bankruptcy court as well as by standards of professional responsibility to represent debtor in connection with any contested matter or adversary proceeding involving debtor's interests until the attorney is granted permission to withdraw. While debtor's attorney is not required to provide services without compensation, a debtor's failure or refusal to pay for attorney's services does not justify the attorney's failure to provide representation. As to the third issue, when the reason for withdrawal is debtor's failure to pay, debtor's attorney must demonstrate that a reasonable arrangement for payment of fees is not possible, and that debtor's attorney has taken actions to protect debtor's rights. The Court decided that sanctions or disciplinary actions were not appropriate given that the attorney acted in good faith.

V. UNBUNDLING IN CHAPTER 13 NOT PERMITTED

- **In re Pair, 77 B.R. 976 (Bankr. N.D. GA 1987)**

In this case, the Court reviewed debtors' attorneys' fees in five Chapter 13 cases. The Court held that the attorney's failure to appear at an adversarial proceeding without court approval for withdrawal from the case warranted imposition of sanctions, and that the practice of collecting post-filing attorneys' fees, without prior application and court approval, warranted imposition of sanctions as well. When the fee is not collected prepetition, the Bankruptcy Code allows attorneys' fees to be paid, after court approval, through the debtor's plan. To that end, Debtor's attorney must represent debtor at adversarial proceedings until the Court grants withdrawal, regardless of the fact that debtor's case became more involved than originally anticipated, and that debtor did not pay additional fees requested by debtor's attorney. The Court noted that Chapter 13 cases typically last 3 to 5 years; and therefore, attorneys should anticipate issues to arise throughout the bankruptcy process. The Court will grant withdrawal only where an unreasonable burden on counsel exists and where withdrawal is justified based on considerations of fairness, reasonableness, and proper protection of the debtor's rights given the circumstances of the case.

VI. FEE ONLY CHAPTER 13 IS NOT PER SE FILED IN BAD FAITH

- **In re Puffer, 674 F.3d 78 (1st Cir. 2012)**

The First Circuit, addressing an issue of first impression, held that fee-only Chapter 13 plans are not per se filed in bad faith. The Court adopted the totality of circumstances test to determine whether a debtor with the advise of counsel has presented a Chapter 13 plan in good faith. The Court emphasized the narrowness of the ruling and that its decision should not be interpreted as a blanket endorsement of fee-only plans. The fundamental purpose of Chapter 13 is to allow a debtor to pay his creditors over time and as such, fee-only plans will by definition leave many debts unsatisfied. Further, the Court recognized that fee-only arrangements may be vulnerable to abuse by attorneys seeking to advance their own interests without due regard for the interests of debtors or at the very least, by their nature, create the appearance of such abuse. Therefore, a debtor has a heavy burden of demonstrating special circumstances to justify this type of arrangement.

- **Ingram v. Burchard, 482 B.R. 313 (N.D. Cal. 2012)**

The District Court held that the bankruptcy court did not clearly err in determining that Chapter 13 debtors' amended plan was not proposed in good faith and refused confirmation. To determine whether to confirm a Chapter 13 plan over a good faith objection, the Ninth Circuit requires courts to consider the totality of the circumstances, including all mitigating factors, on a case-by-case basis. The good faith inquiry focuses on whether debtors acted equitably in proposing the plan. Courts may take into consideration that "veiled Chapter 7" proceedings parading as Chapter 13 plans are strongly disfavored as well. The Court found that the bankruptcy court correctly applied the totality of circumstances standard, but also noted that the Ninth Circuit has not ruled as to whether a per se rule against fee-only Chapter 13 plans would

be permissible. Furthermore, Congress's preference for Chapter 13 plans over complete liquidation under Chapter 7 does not extend to plans that propose lien stripping, zero percent distribution to creditors or other attempts to unfairly manipulate the Bankruptcy Code.

- **In Re Crager, 691 F.3d 671 (5th Cir. 2012)**

The Fifth Circuit held that the bankruptcy court did not clearly err in finding that the proposed Chapter 13 plan, where virtually the entire amount that debtor paid to trustee would go to her attorney, was not an attempt to abuse Chapter 13, but rather was a responsible decision given her particular circumstances. The district court's decision was reversed and the bankruptcy court's confirmation of the Chapter 13 plan affirmed. The Fifth Circuit has no per se rule that zero percent plans, violate the good faith requirement for plan confirmation. The Court of Appeals standard of review for a bankruptcy court's award of attorney fees is abuse of discretion. In the Fifth Circuit, courts apply a fact-intensive totality of the circumstances test to determine whether a Chapter 13 petition is filed in good faith; specifically, courts consider whether the plan shows an attempt to abuse the spirit and purpose of the Bankruptcy Code.

- **In Re Molina, 420 B.R. 825 (Bankr. N.M. 2009)**

The Court held that the Chapter 13 plan proposing to pay only part of administrative attorney fees over thirty-six months, filed by debtor ineligible for Chapter 7 discharge due to prior Chapter 7 discharge less than eight years earlier, met the requirements for a good faith filing. Specifically, the court refused to read a per se requirement of minimum payment into the Bankruptcy Code, and instead found that debtor complied with the letter and spirit of the Code as written. To assess whether the Chapter 13 plan is confirmable, the Court applied the non-exhaustive list of factors compiled by the Tenth Circuit. The Court distinguished this case from

the parallel decision in Paley, stating that the Paley Court added a requirement that Congress did not put into the statute: that a minimal-payment chapter 13 plan will not be confirmed if the debtor is ineligible for chapter 7 relief. Moreover, in this case, the debtor had committed to a full 36 months of payments and there was no evidence debtor attempted to manipulate the Bankruptcy Code.

VII. FEE ONLY CHAPTER 13 CASES LACK GOOD FAITH TAKING TOTALITY OF CIRCUMSTANCES INTO CONSIDERATION

- **In Re Paley, 390 B.R. 53 (Bankr. N.D.N.Y 2008)**

In this case, debtors' who were ineligible for Chapter 7 discharges petitioned for another round of debt forgiveness under Chapter 13. The Court held that debtors' Chapter 13 plans were not proposed in good faith, and thus, refused confirmation. The Court reaffirmed the use of the totality of circumstances test to determine whether a Chapter 13 plan was filed in good faith, but declined to perform an exhaustive analysis of all relevant factors. The Court's underlying reasoning was that a plan whose duration was tied only to payment of attorney's fees, as the case herein, was an abuse of the purpose and spirit of the Bankruptcy Code. Otherwise stated, "[c]hapter 7 cases hidden within Chapter 13 petitions, blur the distinction between the chapters into a meaningless haze" and over time would judicially invalidate § 727(a)(8)'s time restrictions between Chapter 7 discharges. The Court emphasized that the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) did not displace the good faith analysis required under § 1325(a)(3). In fact, establishing good faith is still a perquisite for the confirmation of Chapter 13 payment plans.

- **In re Montry, 393 B.R. 695 (Bankr. W.D.Mo. 2008)**

The Court held that the debtors' Chapter 13 plan, which proposed payment of their Chapter 13 attorney's fees and included nothing on payment to any prepetition creditors, has not been filed in good faith and could not be confirmed. This Court employs a totality of circumstances standard to determine whether a Chapter 13 plan has been proposed in good faith as required for confirmation under § 1325(a)(3) of the Bankruptcy Code. The Court noted that contrary to the debtors' assertion, the totality of circumstances test is the prevailing standard

even after the enactment of the BAPCPA. The Court, reaffirming the reasoning of the Paley court, stated that when the only benefit of filing a Chapter 13 plan is payment of attorney fees over time, the plan runs counter to the spirit and purpose of the Code, and as such, an exhaustive fact-specific analysis is unnecessary. Additionally, the Court feared that confirming Chapter 13 petitions equally suited for Chapter 7 would "subvert the Supreme Court's holding in Lamie v. U.S. Trustee prohibiting the payment of post-petition attorney's fees from a debtor's Chapter 7 bankruptcy estate" as well as raise bankruptcy filing costs.

- **In re Arlen, 461 B.R. 550 (Bankr.W.D.Mo. 2011)**

The Court held that a Chapter 13 plan, which proposes no payment to any creditors, secured or unsecured, and satisfies only the fees of debtors' attorney, is inconsistent with the spirit and purpose of Chapter 13; and therefore, has not been filed in good faith. In applying the totality of circumstances test, the Court stated that performing an exhaustive analysis of the factors for good faith is unnecessary, rather the key inquiry is whether a plan violates the spirit and purpose of Chapter 13. This Court relied heavily on the reasoning of the Paley Court, maintaining that the purpose of Chapter 13 is to enable debtors to adjust their debts and reorganize their financial affairs by servicing debts out of future income pursuant to a plan. Additionally, the Court reaffirmed that debtors were not required to include Social Security income in their plans or commit such income in any way to unsecured creditors.

- **In Re Lehnert, 2009 WL 1163401 (E.D. Mich. Jan. 14, 2009)**

The Court held that debtors' Chapter 13 plan was proposed in bad faith and it was not entitled to confirmation where the largest creditors had non-dischargeable claims and debtors' underestimated their income by $1000 dollars per month. In determining whether a plan has been

proposed in good faith, courts examine the totality of the circumstances. While good faith does not necessarily require a substantial repayment to creditors, a plan proposing payment of attorney fees and a zero percent distribution for unsecured creditors does not strike the Court as a good faith effort to repay pre-petition creditors.

- **In Re Barnes, 2013 WL 153848 (Bankr.E.D.N.C. Jan. 15, 2013)**

The Court held that early termination language is in direct conflict with § 1325(b)(4) of the Bankruptcy Code; and therefore, Chapter 13 plans that included such language will fail good faith analysis. In the case at bar, the issue is whether debtor, who has zero disposable income, may obtain confirmation of a Chapter 13 plan, which in effect will terminate before the applicable commitment period, and which proposes to discharge substantial amounts of unsecured debt while agreeing to pay the trustee's commission and the debtor's attorney's fees. Based on the Supreme Court decisions in Lanning and Ransom, and lower court interpretations of these decisions, this Court adopted a forward-looking approach to determine projected disposable income, and ruled that the applicable commitment period is a temporal requirement for all debtors. Under the forward-looking approach, a debtor must commit all projected disposable income for thirty-six or sixty months; and if disposable income is zero or less, then the court must look to projected disposable income based on income minus expenses to determine what actual income or expenses are known or nearly certain at the time of confirmation. This approach is antithetical to the concept of a Chapter 13 plan, which includes an early termination provision. Underscoring this point, the Court stated that if Congress intended for Chapter 13 plans to contain early termination provisions, Congress would have explicitly allowed for them. Additionally, the Court decided that a Chapter 13 plan, which proposes to pay only attorneys' fees and discharges substantial unsecured debts has not satisfied subsections

(a)(3) and (a)(7) of §1325 and confirmation would be refused. The Court found that fee only plans are not per se proposed in bad faith, meaning that a debtor may be able to prove circumstances that would justify a fee only arrangement. That being said, the Court concluded that there is little doubt that these types of plans are attempting to manipulate the Bankruptcy Code to discharge debts at the expense of creditors.

- **In Re Buck, 432 B.R. 13 (Bankr. Mass. 2010)**

The Court held that Chapter 13 plans where the singular purpose is to pay counsel's fees over time will not satisfy any fair interpretation of the term "good faith" and will not be confirmed. Here, debtors' attorney was not entitled to compensation for his services because counsel advised debtors', who were eligible for Chapter 7 relief and who had overwhelming likelihood of retaining all of their assets and obtaining immediate discharge of their debts in Chapter 7, to file for fee-only Chapter 13 relief. The Court stated "such filings have the inherent effect of placing the interests of the attorney above those of his client, the Court and the bankruptcy system as a whole" and "allowing attorneys to utilize Chapter 13 for the sole purpose of ensuring payment of fees runs afoul of these manifest purposes of Chapter 13." Additionally, in this Circuit, reasonable compensation is generally analyzed using the lodestar approach, and should take into account the type of work performed, who performed it, the expertise that it required, and when it was undertaken. The court must consider prevailing market rates in determining the lodestar rate, including the customary rates in the jurisdiction, but there is no presumption that the Professional is entitled to the amount he or she requests. While judges should exercise special care in characterizing the services of an attorney as excessive or unnecessary, deference on the part of the court was not appropriate in this case. The debtors' plans would clearly fail a good faith inquiry under § 1325(a)(3).

VIII. WHAT NOT TO DO

- **In re Brent, 458 B.R. 444 (Bankr. N.D. Ill 2011)**

The Court held that counsel violated Rule 9011 when he represented, in 317 Chapter 13 fee applications that he had entered into a Model Retention Agreement (MRA) with the debtor, but failed to disclose that he had altered the MRA by tacking on an addendum, which allowed him to charge fees beyond the district's flat fee. The Court determined such actions warranted imposition of sanctions. Rule 9011 governs representations to the bankruptcy court and in particular, subsection (b)(3) prohibits misstatements, half-truths and assertions of fact without sufficient support whether about the merits or about the case itself, including attorneys fees. To be sanctionable, a misstatement or omission must have been "culpably careless". Generally speaking, attorneys are compensated under § 330(a) using the lodestar method wherein a reasonable number of hours is multiplied by a reasonable hourly rate to determine attorney fees; however, courts do not require the lodestar method. Additionally, the Court recognized that flat fees or no look fees used for compensation of a Chapter 13 debtor's attorney are presumptively reasonable standard fees and may be awarded without the kind of detailed application and itemization of services that the bankruptcy rules would otherwise demand. The Court noted that flat fees represent a kind of agreement not only with the Chapter 13 debtor, but with the court as well.

- **In Re Dicey, 312 B.R. 456 (Bankr. N.H. 2004) (Pre-BAPCPA)**

The Court held that debtors' did not meet their burden of demonstrating that their Chapter 13 plan was filed in good faith; and, therefore, confirmation was denied. For confirmation purposes, debtor bears the burden of demonstrating that the Chapter 13 plan was proposed in good faith, and this burden is especially heavy when debtor seeks superdischarge of a debt that

would not be discharged in Chapter 7 proceedings. The Court applies the totality of circumstances standard and uses six factors to analyze whether a Chapter 13 plan has been filed in good faith. The facts of this case are noteworthy, in that debtors' sought protection of bankruptcy two weeks after an adverse state court judgment for intentional torts of assault and battery, which would have been non-dischargeable under § 526 (a)(6). While the purpose of Chapter 13 is to give qualified debtors another option to the total liquidation proceeding in Chapter 7, the Court stated that Chapter 13 is not a shield to allow tortfeasors to avoid payments already adjudicated.

Hypothetical Scenarios

"Unbundling" in the Representation of Consumer Debtors:

What are the Differences Between You and a Petition Preparer?

Mark S. Zuckerberg
429 N Pennsylvania St – Ste 100
Indianapolis, IN 46204

HYPOTHETICAL #1 FACTUAL SCENARIO:

Debtor meets with counsel regarding a Chapter 7 bankruptcy filing. Due to the debtor's household size and income, there is no question that he qualifies as a candidate for Chapter 7. However, one of the debtor's creditors has obtained a state court judgment. He wants to file bankruptcy as soon as possible out of fear of a wage garnishment and a levy on his bank account. The debtor earns the minimum wage at his job and cannot afford the upfront $1,500 flat fee quoted for representation in his Chapter 7 case. The debtor says he can pay $500 immediately and offers to pay the remainder after the bankruptcy filing. How should you proceed?

HYPOTHETICAL #1 ANSWER:

Debtor and counsel should enter into separate fee agreements for pre- and post-petition services. The pre-petition agreement should provide for payment of the $500 in legal fees for specifically outlined pre-petition services. The pre-petition agreement should contain a clause expressly providing that counsel will not represent the debtor after filing the bankruptcy petition unless a separate post-petition fee agreement is signed. The legal fees for post-petition services should also be disclosed in the pre-petition agreement, and there should be no language obliging the debtor to hire counsel for post-petition services.

After filing the debtor's Chapter 7 case, counsel and debtor should enter into a post-petition fee agreement for the remaining $1,000. Counsel should take great care in drafting these separate fee agreements so not to raise dischargeability issues regarding the post-petition legal fees. Boilerplate language should not be used, as courts construe these agreements in the light most favorable to the debtor. The keys to unbundling legal services are to provide competent representation, adequate consultation and informed consent in accordance with the applicable ethical rules. *See In re Slabbinck*, 482 B.R. 576, 597 (Bankr. E.D. Mich. 2012) (holding attorney's legal services for debtor may be unbundled between pre- and post-petition services where separate fee agreements were executed in strict conformance with the Modal Rules of Professional Conduct); *see also Walton v. Clark & Washington*, 469 B.R. 383, 385 (Bankr. M.D. Fla. 2012) (approving payment system in which "the client executes separate fee agreements for prepetition and postpetition services").

HYPOTHETICAL #2 FACTUAL SCENARIO:

Debtor meets with counsel regarding the filing of a Chapter 7 bankruptcy. Among other debts, the debtor is currently in the midst of the foreclosure of the primary lien against her residence. A judgment has been entered and the sheriff's sale date is next week. The debtor is elderly and needs additional time to move from her home. Her only income is Social Security and she has little savings. She would like to make a small down payment towards the legal fees pre-petition and offers several postdated checks to be deposited post-petition to pay the balance. How should you proceed?

HYPOTHETICAL #2 ANSWER:

As an example of what not to do, counsel should not enter into a fee agreement allowing the debtor to make a small pre-petition payment with the remainder to be paid post-petition. Courts have held all legal fees owed by Chapter 7 debtors at the time their bankruptcy petitions are filed are dischargeable under 11 U.S.C. § 727, including legal fees owed under a pre-petition agreement, whether or not the services were performed pre- or post-petition. *See Bethea v. Robert J. Adams & Assoc.*, 352 F.3d 1125 (7th Cir. 2003), *cert. denied*, 124 S.Ct. 2176 (2004). Postdated check fee agreements have also been invalidated as a violation of the automatic stay or discharge injunction. *See Walton*, 469 B.R. at 385.

HYPOTHETICAL #3 FACTUAL SCENARIO:

Debtor files for Chapter 7 bankruptcy. One of the debtor's assets is a vehicle with a secured loan held by Capital One Auto Finance. The debtor's monthly payments are reasonable and the loan is nearly paid off. The debtor receives a reaffirmation agreement and asks counsel for assistance in reaffirming the debt. Counsel explains to the debtor that negotiation of reaffirmation agreements and representation of debtor in any related proceedings are outside the scope of his representation in the bankruptcy case. Can legal services related to reaffirmation agreements be properly unbundled?

HYPOTHETICAL #3 ANSWER:

Probably not, several courts have held that excluding legal services related to reaffirmation agreements from the scope of representation is not a reasonable limitation. *See In re Collmar*, 417 B.R. 920, 923 (Bankr. N.D. Ind. 2009); *In re Minardi*, 399 B.R. 841, 852 (Bankr.N.D.Okla.2009); *In re Egwim*, 291 B.R. 559, 573 (Bankr. N.D.Ga. 2003). This is due to the integral role played by counsel in the reaffirmation process. The unbundling of legal services related to reaffirmation agreements is even less likely to garner court approval where debtors have not given their informed consent to such an exclusion. *Collmar*, 417 B.R. at 923.

HYPOTHETICAL #4 FACTUAL SCENARIO:

Counsel is a rural attorney who files a Chapter 7 bankruptcy for debtors, a husband and wife. The debtors' § 341 meeting of creditors is scheduled at a location that is over an hour drive, one way, from the attorney's law office. In an effort to save his time and his clients' money, the attorney has started unbundling his attendance at § 341 meetings from the legal services provided to debtors. Does this practice run afoul with any ethical rules or other obligations owed to his clients?

HYPOTHETICAL #4 ANSWER:

Although unbundling this service is common, most courts to address the issue have found attendance at the § 341 meeting to be a "fundamental and core" obligation imposed upon the attorney. *In re Johnson*, 291 B.R. 462, 470 (Bankr. Minn. 2003) (citing *In re Castorena*, 270 B.R. 504, 530 (Bankr. D. Idaho 2001)); *see also In re Bancroft*, 204 B.R. 548 (Bankr. C.D. Ill.

1997). As such, it is likely to be "exceedingly difficult" to show the obligation to attend the § 341 meeting was properly contracted away. *Id.*

HYPOTHETICAL #5 FACTUAL SCENARIO:

Debtor files a Chapter 7 bankruptcy and is awaiting her discharge. A creditor timely files an adversary complaint asserting the nondischargeability of a certain debt under 11 U.S.C. § 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity. Can the debtor's attorney successfully unbundle representation of the debtor in the adversary proceeding from the other legal services provided in her Chapter 7 case?

HYPOTHETICAL #5 ANSWER:

Yes, several courts have held that adversary proceedings can be unbundled from a consumer's main bankruptcy case and attorneys may charge additional fees for representation of a debtor in an adversary proceeding. As stated by one bankruptcy court, this practice is not necessarily evil, but "must be done intelligently and in accordance with the applicable rules of professional responsibility" and other relevant laws. *In re Seare*, 493 B.R. 158, 227 (Bankr. D. Nev. 2013). The *Seare* case demonstrates how to avoid running afoul with ethical rules when unbundling these types of legal services.

Prior to filing bankruptcy, the debtor in *Seare* had a judgment entered against him based in part on fraud. A wage garnishment was initiated and the debtor and his wife sought advice from bankruptcy counsel. After the initial consultation, the debtors signed a retainer agreement which was evidently the same for all clients. The retainer agreement provided that representation of the debtors in an adversary proceeding was not included in the firm's basic bankruptcy services, and that additional fees may be charged. The garnishment and underlying lawsuit were listed throughout the debtors' bankruptcy schedules and statement of financial affairs. The creditor subsequently filed an adversary proceeding seeking the nondischargeability of the debt pursuant to 11 U.S.C. §§ 523(a)(4) and (6).

The attorney who filed the debtors' bankruptcy case refused to defend the adversary proceeding, claiming the retainer agreement unbundled those legal services from the scope of his representation. The bankruptcy court entered an order to show cause as to why sanctions should not be entered against the attorney for his failure to represent the debtors in the adversary proceeding. The court ultimately found the bankruptcy attorney breached his duty of competence by failing to ascertain the debtors' objective to eliminate the wage garnishment related to a fraud judgment. Basically, the court found the attorney failed to properly inform himself as to the situation surrounding the fraud judgment, since the attorney's practice was to treat all clients the same with little or no differentiation between cases. The court found the attorney violated numerous state ethical rules and Bankruptcy Code sections in the matter, and entered sanctions in an effort to incentivize the attorney from operating his bankruptcy "mill" system of processing cases.

HYPOTHETICAL #6 FACTUAL SCENARIO:

After meeting with a potential client, counsel determines that the debtor is a good candidate for Chapter 7 bankruptcy. Counsel quotes the client a flat legal fee of $1,500 for standard representation in her bankruptcy case. The debtor then informs counsel that she cannot afford the legal fee. She is a single mother with several dependents and earns minimum wage at her job. She does not expect her financial situation to change in the future, thus allowing her to pay the legal fees at some later date. The debtor asks you if there is any way you can still assist her (at a much lower fee) without officially representing her in the bankruptcy case. She says she heard from a friend that attorneys sometime assist in the preparation of bankruptcy petitions and related documents, but the debtors represent themselves in the actual bankruptcy case. What issues does counsel face in this scenario?

HYPOTHETICAL #6 ANSWER:

The term "ghostwriting" has been coined to describe the behind the scenes preparation of legal documents by attorneys for clients who represent themselves in court. The attorney prepares the legal documents, but does not sign them.

Proponents of ghostwriting assert that this gives lower and middle class debtors access to the legal system at an affordable cost. Opponents point to the numerous ethical issues that can arise. For example, *pro se* bankruptcy filers are generally held to a less stringent standard and are granted special leniency by trustees and courts. Opponents also argue unbundled ghostwriting violates several rules of professional conduct including the duty of candor to the court and the duty of fairness to opposing parties. *See, e.g.,* ABA Model Rule of Professional Conduct 3.3 Candor Toward the Tribunal, Rule 3.4 Fairness to Opposing Party & Counsel.

The American Bar Association Standing Committee on Ethics and Professional Responsibility has opined that whether ethical violations occur depend on the extent of a ghostwriter's participation. The more extensive the assistance to the *pro se* litigant, the more likely an attorney is to run afoul with the rules of professional conduct. An undisclosed attorney who renders extensive assistance to a *pro se* litigant is involved in the litigant's misrepresentation contrary to the ABA Model Code of Professional Responsibility DR 1-102(A)(4). This Rule provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

However, it may still be possible to unbundle ghostwriting services without violating the rules of ethics. Ghostwriting creates an attorney-client relationship, so an attorney must be in full compliance with the rules of professional conduct. It is advisable for attorneys to sign pleadings they have substantially prepared. Several courts have found failure to do so to be unlawful. Attorneys should also prepare engagement agreements that carefully outline the ghostwriting services to be unbundled. It should be clear to all parties involved the limited extent of the attorney's legal services in the matter.

HYPOTHETICAL #7 FACTUAL SCENARIO:

Debtor comes to your office with a complicated factual scenario. He has over $185,000 in unsecured debt, and several of his creditors have filed suit. The first creditor to obtain a judgment against the debtor has started a wage garnishment. The debtor makes good money at his job as an engineer, but the wage garnishment has left him unable to pay his necessary monthly expenses. The debtor was also a beneficiary under his father's will. His father passed away last year, and left all his property – including his unencumbered residence – to the debtor and his sister. Due to the debtor's financial problems, he quitclaimed his interest in the residence to his sister without any consideration. The last property tax assessment assessed the residence's value at $165,000. This raises fraudulent transfer concerns and will likely raise the amount the debtor must pay into his Chapter 13 plan under the liquidation analysis pursuant to 11 U.S.C. § 1325(a)(4).

The debtor was also divorced three years ago. Pursuant to the terms of the divorce decree and property settlement agreement, he is to pay $525 per week in child support. The debtor is current on his child support obligations, but will not be able to maintain payments due to the wage garnishment. In addition to smaller obligations, he was ordered to pay his ex-wife $79,500 in equity in their former marital residence. Debtor is still living in the residence, but it is in foreclosure. His ex-wife is aware of the debtor's financial troubles, and has hired an attorney to represent her in his future bankruptcy case. It has been communicated to the debtor that she intends to fight the discharge of this obligation by arguing it falls within the parameters of a "domestic support obligation" pursuant to 11 U.S.C. § 523(a)(5).

It is your practice not to represent debtors involved in such complicated matters and refer such cases to other attorneys. However, the debtor is desperate and asks for your help. Since the wage garnishment is in place, he does not have enough money to pay his next car payment or cell phone bill. He will also soon fall behind on child support. He asks if you can file the barebones paperwork with the bankruptcy court to start his Chapter 13 case. This will stop the wage garnishment and give him additional time to hire a new attorney. What ethical and legal issues arise in this scenario?

HYPOTHETICAL #7 ANSWER:

This scenario is rife with potential ethical and legal issues, so one must tread carefully. Unbundling legal services in a Chapter 13 bankruptcy raises many of the same issues as in Chapter 7. The debtor's attorney should be aware of his or her state's rules of professional conduct to ensure the debtor provides informed consent to the unbundling of legal services. For example, Model Rule of Professional Conduct 1.2(c) provides "[a] lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."

Attorneys also have a duty under Model Rule of Professional Conduct 1.1 to provide competent representation to a client. This requires the legal knowledge, skill and preparation reasonably necessary for competent representation.

The fee agreement for pre-petition work should outline the pre-petition services in detail as well as the post-petition services that will not be performed by the attorney. The fee agreement should also list the ramifications and risks of proceeding without an attorney after the case is filed, and clearly provide that it is the debtor's intention to hire a new attorney to represent him after the initial filing of his bankruptcy case within a certain time period. Despite informed consent and a carefully worded fee agreement, this arrangement is likely to draw scrutiny from the Chapter 13 trustee and/or the court.

Subsequent to filing the case, the attorney could file a motion to withdraw from the case. *See In re Egwim*, 291 B.R. 559, 579 (Bankr. N.D. Ga. 2003) (citing *In re Pair*, 77 B.R. 976, 979 (Bankr. N.D.Ga. 1987)). A number of factors determine whether a court will permit an attorney to withdraw representation in this scenario. Exigent circumstances aside, it seems unlikely withdrawal would be permitted where the debtor delays or fails to hire new counsel. The attorney may unwittingly find him- or herself bound to represent the debtor by the court and rules of ethics.

HYPOTHETICAL #8 FACTUAL SCENARIO:

A potential client comes to your office and wants to immediately file bankruptcy. She is elderly and her only income is Social Security and wages from a part-time job. Her bank account was recently frozen by a judgment creditor and her rent is due at the end of the week. The client does not have funds to pay your legal fees and is very distraught by the entire situation. She is a below median consumer debtor and otherwise qualifies for a Chapter 7 bankruptcy. Schedules I and J show the debtor has no disposable income to fund a Chapter 13 plan. Is it a viable option to place the client in a "fee-only" Chapter 13 plan?

HYPOTHETICAL #8 ANSWER:

It depends – the propriety of fee-only Chapter 13 plans is an issue that has divided bankruptcy courts. Several courts have rejected fee-only plans. *See*, *e.g.*, *In re Paley*, 390 B.R. 53, 59 (Bankr.N.D.N.Y. 2008) (rejecting fee-only plan as contrary to spirit and purpose of Bankruptcy Code); *In re Platt*, Case No. 12-6170-RLM-13 (Bankr. S.D. Ind. Nov. 19, 2012) (holding that although not all fee-only Chapter 13 plans are *per se* filed in bad faith, debtor failed to demonstrate "special circumstances" to warrant confirmation).

Numerous other courts have upheld fee-only plans, including the Fifth Circuit Court of Appeals. In *In re Crager*, 691 F.3d 671 (5th Cir. 2012), the Fifth Circuit reversed the ruling of the district court and affirmed the bankruptcy court's confirmation of the debtor's fee-only Chapter 13 plan. *Crager* involved a debtor who was unemployed and whose main source of income was Social Security and food stamps. Her main asset was her primary residence, which was encumbered by a mortgage. She had nearly $8,000 in credit card bills and anticipated incurring future medical bills due to health issues. The debtor decided to file Chapter 13 bankruptcy for several reasons. It would have taken her over a year to save the money to file Chapter 7 bankruptcy, and she would have had to stop making the minimum payments on her credit cards. She was also concerned that filing Chapter 7 would prevent her from declaring bankruptcy again for a longer period, as she anticipated incurring future medical bills. Thus, her attorney filed the fee-only Chapter 13 case.

The Chapter 13 trustee subsequently objected to confirmation of her plan. The objection asserted the debtor's petition and plan were not filed in good faith pursuant to 11 U.S.C. §§ 1325(a)(3) and (7). Courts in the Fifth Circuit apply a "totality of the circumstances" test to determine whether a Chapter 13 petition and plan are filed in good faith. The bankruptcy court applied this test and approved the debtor's plan. The district court reversed and the Circuit Court later affirmed the bankruptcy court's confirmation of the plan. *See also*, *In re Puffer*, 674 F.3d 78, 80 (1st Cir. 2012) (holding fee-only plans are not *per se* filed in bad faith and remanding to district court for further proceedings).

HYPOTHETICAL #9 FACTUAL SCENARIO:

A potential client meets with counsel regarding the filing of a bankruptcy case. The client seems like a candidate for Chapter 7 bankruptcy, but his case presents several complex issues. First, the client has several years of late and unfiled income tax returns with both the federal and state taxing authorities. In order to determine the priority and dischargeability status of the income taxes, counsel will need to order tax transcripts and complete a tax analysis. One of the debtor's creditors also obtained a default judgment against him in state court on the basis of fraud. It appears likely the creditor will file an adversary proceeding seeking nondischargeability of the debt under 11 U.S.C. § 523.

You quote the client a flat fee of $2,500 to complete a pre-petition tax analysis and to file a barebones Chapter 7 petition. Client promptly pays the retainer and asks you to begin work on the case. Several weeks later, the client calls you and says he does not want to file bankruptcy. He intends to make payment arrangements with his creditors. As such, he asks for a refund of the $2,500 retainer. You have already spent several hours working on the case and meeting with the client. The fee agreement signed with the client contains a non-refundability clause. How much – if any – of the $2,500 retainer are you obligated to return to the client?

HYPOTHETICAL #9 ANSWER:

As a general rule of thumb, attorneys are obligated to refund clients any unearned fees. Fee advances paid by clients to be earned on an hourly basis must be held in trust. If representation ends prior to earning the fee advance, a disbursement from the trust account must be made to the client. *Estate of Forrester v. Dawalt*, 562 N.E.2d 1315, 1317-18 (Ind. Ct. App. 1990); *see also Matter of Kendall*, 804 N.E.2d 1152, 1160 (Ind. 2004).

A refund of fixed fees presents a slightly more complicated scenario. It has been held that fixed fees may be deemed earned when paid, therefore these fees do not have to be deposited into trust. Fixed fees immediately become the attorney's property. However, fixed fees are not immune to refundability. In certain situations, an attorney may be required to make a prompt refund from the attorney's own funds when the attorney's services end prematurely.

In Indiana, the law has clearly established that attorney's fees cannot be non-refundable. Indiana Rule of Professional Conduct 1.16(d) and *Matter of Thonert*, 682 N.E.2d 522, 524-25 (Ind. 1997) clearly establish non-refundability provisions in fee agreements are unreasonable and unethical.

Summary of Recommendations Made By the "Final Report of the ABI National Ethics Task Force" (April 21, 2013), Regarding "Best Practices for Limited Services Representation in Consumer Bankruptcy Cases"

Judge Thomas J. Tucker,
United States Bankruptcy Court for the Eastern District of Michigan,
Detroit, Michigan
with assistance from Jasmine D. Rippy, Judicial Extern

In its April 21, 2013 Final Report, which may be found on the ABI website at http://materials.abi.org/sites/default/files/2013/Apr/Final_Report_ABI_Ethics_Task_Force.PDF, the ABI National Ethics Task Force included a 15-page section entitled "Best Practices for Limited Services Representation in Consumer Bankruptcy Cases." After discussing this topic, the Task Force recommended a proposed rule; a model agreement and consent form; and a list of "best practices."

The Report notes that under Rule 1.2(c) of the Model Rules of Professional Conduct, "[a] lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent." (Note: not all states have adopted this language in their version of the Model Rules. Michigan, for example, has not adopted this language in its version of Rule 1.2. Instead, Rule 1.2(b) of the Michigan Rules of Professional Conduct says that "[a] lawyer may limit the objectives of the representation if the client consents after consultation.")

A. The proposed rule

The Task Force Report's proposed rule states that:

> **If permitted by the governing Rules of Professional Conduct**, a lawyer may limit the scope of the representation of an individual debtor (or debtors in a joint case), whose debts are primarily consumer debts, **if the limitation is reasonable under the circumstances and the client gives informed consent in writing**.

(emphasis added; footnote omitted).

The proposed rule then discusses what "reasonable" means in this context. According to the proposed rule, a "reasonable" limited services agreement must include all of the following services:

> 1. An initial meeting with the debtor to explain the bankruptcy process and discuss pre-bankruptcy planning (including exemptions) as well as non-bankruptcy alternatives.

2. Advice to the debtor about the debtor's obligations and duties under the Bankruptcy Code and Rules and applicable court orders.

3. Preparation and filing of the documents and disclosures required by the Bankruptcy Code, including performance of the duties imposed by Section 521 of the Code.

4. Provision of assistance with the debtor's compliance with Section 707(b)(4) of the Bankruptcy Code.

5. Preparation and filing of the petition, the Statement of Financial Affairs, and the necessary schedules.

6. Attendance at the Section 341(a) meeting.

7. Communication with the debtor after the Section 341(a) meeting.

8. Monitoring the docket for issues related to discharge.

9. [For a debtor with listed secured debts,] representation of the debtor (including counseling) with respect to the reaffirmation, redemption, surrender, or retention of consumer goods securing obligations to creditors.

The agreement *may* include the following other services, "to be indicated with a check on the Model Agreement." Thus, by implication, a limited services agreement may *exclude* any or all of the following from the scope of the representation:

1. Representation of the debtor in connection with a motion by the Chapter 7 trustee to reopen the case for the inclusion of newly discovered assets.

2. Representation of the debtor in connection with a challenge to discharge and/or the dischargeability of certain debts.

3. Preparation and filing of all motions [not covered by the "must include" list above] required to protect the debtor's interests.

4. Representation of the debtor with respect to defending objections to exemptions.

5. Preparation and filing of responses to all motions [not covered by the "must include" list above] filed against the debtor.

6. Representation of the debtor in connection with a motion for relief from stay.

7. Representation of the debtor in connection with a motion for relief from stay that is resolved by agreement.

8. Representation of the debtor in connection with a motion seeking dismissal of the case.

B. The model agreement and consent form

The Report's model agreement and consent form tracks the proposed rule. It lists the required services and provides a checklist for optional services. It includes various recommended disclaimers and consent to the limited scope of representation, including the following language:

> You agree that I am being hired to provide you limited bankruptcy-related representation and recognize that at any time between now and when your case is concluded (either because you receive a discharge, your case is converted to a case under another chapter, or because your case is dismissed), circumstances may arise that require additional legal advice and/or legal services. In such event, you have the option of engaging my services for an additional fee, hiring another attorney, or representing yourself.

C. The "best practices" list

The Task Force Report's list of "best practices" includes all of the following:

1. The initial client interview and counseling should make clear the expected scope of representation and the expected limited fee.

2. Attorneys counseling unsophisticated consumer debtors must be mindful, when gathering initial information to assess a case, to avoid the formation of the debtor's perception that a full-scale attorney-client relationship is being formed.

3. An engagement letter and informed consent should be prepared in plain language and carefully reviewed with the debtor. This letter must clearly and conspicuously set forth the services being provided, the services *not* being provided, and the potential consequences of the limited services arrangement.

4. The engagement letter must also clearly describe the fee arrangement, including a statement of how fees for additional services will be charged.

5. All documents and disclosures filed with the bankruptcy court should be done with full candor consistent with the attorney's duty of confidentiality, disclosing the exact nature of the representation and the calculation of fees for services being provided.

6. In the event that withdrawal from the unbundled representation becomes warranted, attorneys must be mindful of protecting their client's interests to the fullest extent practical when exiting the case.

7. As in the case with all legal representation, if the attorney becomes aware of a legal remedy, problem, or alternative outside of the scope of his or her representation, the client must be promptly informed. The attorney has the further obligation to provide his or her client with a thorough explanation of the potential benefits and harms implicated, in order for the client to make an informed decision as to how to proceed.

(italics in original).